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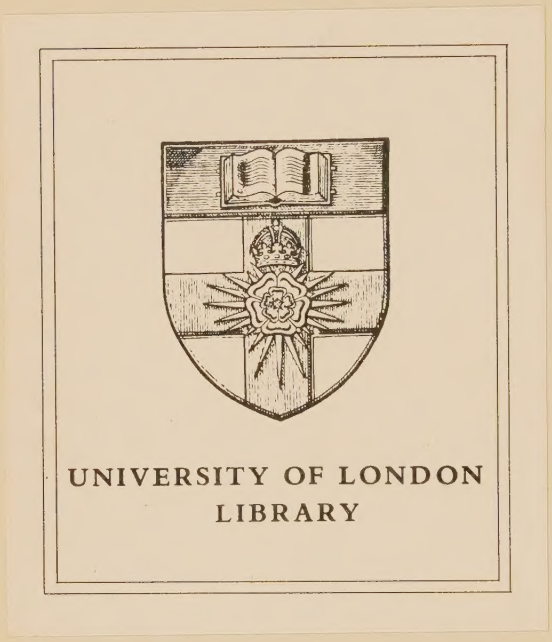

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AND

IN THE COURT OF APPEAL

BY

CHARLES MARETT, HENRY HOLROYD, AND
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CASES

DETERMINED BY THE

COMMON PLEAS DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION

XLI VICTORIA.

[IN THE COURT OF APPEAL.]

1877
Nov. 3.

DICKSON AND OTHERS *v.* REUTER'S TELEGRAM COMPANY, LIMITED.

Telegraph Company—Representation of Accuracy of Message—Privity of Contract—Negligence—Liability for Mistake in delivering Message.

16 C.L.D. 510
11 Q.B.D. 719

The defendants, a telegram company, through the negligence of their servants, delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their agents and was intended for them, acted upon it and thereby incurred a loss :—

Held, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents.

APPEAL from the judgment of the Common Pleas Division in favour of the defendants on demurrer to the statement of claim, which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson, & Co., of Liverpool; the defendants were a telegraph company, having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The

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defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December, 1874, Dickson, Robinson, & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December, 1874, the plaintiffs received at Valparaiso a telegraphic message, which they understood, and reasonably understood, to be a direction from Dickson, Robinson, & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The mis-delivery was caused by the negligence of the defendants or their agents. On receiving the telegram the plaintiffs proceeded to execute the supposed order and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments, sustained a serious loss, and they now claimed that the defendants' company should reimburse them for that loss.

The facts are fully stated in 2 C. P. D. 62, where the proceedings in the Common Pleas Division are reported.

Nov. 2, 3. *Herschell, Q.C.* (*Benjamin, Q.C.*, and *W. H. Butler* with him), for the plaintiffs. The question is, whether the statement of claim shews any cause of action. No doubt the case is novel, but if in the progress of mercantile dealing new cases arise, the Court will evolve the principle of law necessary to meet the exigencies of them, as was done in *Collen* v. *Wright* (1). This action can be supported on two grounds: first, the defendants warranted to the plaintiffs that they had been employed to deliver this message to the plaintiffs, and the defendants are liable for a breach of warranty, in analogy to the case of *Collen* v. *Wright.* (1), where the agent represented that he was acting for a principal; secondly, the defendants are carrying on the business of delivering

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

telegraphic messages, and they are liable to any one dealing with them who is injured through their negligence in carrying on that business. In *Playford* v. *United Kingdom Telegraph Co.* (1) the action was brought for a mere error in the delivery of a message, and negligence was not alleged; in the present case negligence is charged, and on demurrer it is admitted that there was negligence.

The defendants warranted that the message was correct, or at least that their agents would take every precaution to avoid mistake. In *Collen* v. *Wright* (2) it was held that the plaintiff could sue an agent, because by purporting to act as agent he warranted that he was an agent; here the defendants, by delivering the message to the plaintiffs, warranted that they had authority to deliver the message. The general rule is that the representation must be false to the knowledge of the party making it in order to maintain an action on it. Upon this general rule an exception has been engrafted by *Collen* v. *Wright* (2), that a person representing himself to be an agent impliedly contracts that he has the authority of his alleged principal. The defendants, in effect, warranted that they had the authority of Dickson, Robinson, & Co. to deliver the message, and they warranted that the message was sent by them; it therefore falls within the principle of the exception, which has been established by *Collen* v. *Wright.* (2)

On the other point, as to negligence, if a person carrying on a business acts negligently in conducting that business, he is liable to any person dealing with him who is injured by his negligent act. The defendants, in carrying on their business, negligently delivered a message, which they knew might be mischievous if they delivered it to the wrong person. The telegram was supposed by the plaintiffs to be received, not from a stranger, but from persons who were in the habit of dealing with the defendants in the course of their business by means of a cipher, and it was the duty of the defendants to use the cipher with due care. This they failed to do, and therefore they are liable to compensate the plaintiffs for the injury sustained by them.

If the defendants are not liable in the present action very serious consequences will ensue. A telegraph company may

(1) Law Rep. 4 Q. B. 706.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

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deliver a message to a person for whom it is not intended, and may with impunity cause very great injury to the person who receives it and is induced to act upon it. The consequence will be that telegraph companies will become careless in the conduct of their business, and very great public detriment will be sustained.

A great analogy exists between the liability of a common carrier and a telegraph company: Sedgwick on Damages, 6th ed. p. 443; *New York and Washington Printing Telegraph Company* v. *Dryburgh* (1). A carrier is bound to deliver safely the goods intrusted to him, and a telegraph company are equally bound to transmit to the proper recipients the messages which they undertake to send along their lines.

Watkin Williams, Q.C. (*H. D. Greene* with him), for the defendants. *Collen* v. *Wright* (2) forms no exception to the general rule that no action will lie for an innocent misrepresentation; the principle of that decision is that a person who, by representing himself to be an agent, invites another to enter into a negotiation with him, shall be held liable for the consequences if that representation turns out to be untrue. The law does not imply any warranty by a telegraph company that the messages sent by them are correct; and from the nature of the business it is plain that the company do not warrant that those whom they employ shall not commit mistakes; their servants and agents may often be ignorant of the real meaning of a message, and they have no power of ascertaining in what sense the words are to be understood by the intended recipient. It may be true that negligence on the part of the telegraph company was not charged in *Playford* v. *United Kingdom Telegraph Company* (3); but it is a fallacy to contend that this circumstance rendered that decision inapplicable, for negligence involves the omission of a duty, and here the defendants did not owe to the plaintiffs any duty, for no relation existed between them, and a duty can only be created either by law or by contract.

Herschell, Q.C., did not reply.

(1) 35 Penns. Rep. 298.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(3) Law Rep. 4 Q. B. 706.

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BRAMWELL, L.J. I am of opinion that this judgment must be affirmed.

The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiffs' counsel, and primâ facie includes the present case. But then it is urged that the decision in *Collen* v. *Wright* (1) has shewn that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen* v. *Wright* (1), properly understood, shews that there is an exception to that general rule. *Collen* v. *Wright* (1) establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen* v. *Wright* (1). If so, it appears to me that it does not apply to the facts before us, because in the present case I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and *Collen* v. *Wright* (1), and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.

But then it is argued that this is a case of misfeasance, that is, a case of negligence. Now the defendants' counsel made a remark which seemed to me very just, namely, that before any person can complain of negligence he must make out a duty to take care; and that that duty to take care can only arise in one of two ways,

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

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namely, either by contract or by the law imposing it. That it does not arise by contract in this case is shewn by the observations which I have already made for the purpose of pointing out that there is no contract between the plaintiffs and the defendants. Does that duty arise by law? If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It seems to me therefore, that that point also fails the plaintiffs.

Further, the defendants did not guarantee that the message was authentic, and so far as they were concerned it might not be true. The action is not maintainable upon the ground of an implied warranty that the message was correct.

Another point raised was that the mistake was committed in the ordinary business of the defendants. I hardly know how that was made a separate ground of argument. Inaccuracy in a telegram is more likely to mislead than inaccuracy in a verbal statement: and the delivery of a telegraphic message is a more formal matter than the communication of a message by word of mouth. I cannot however see any distinction in principle between them.

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation, however bonâ fide made, a great check would be put upon many very useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable either in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to gain customers) the

existence of this liability is a kind of security for the proper delivery of the messages intrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not the owners of the message. Possibly some analogy may exist between the present facts and a case where a carrier has delivered goods to a person, for whom they were not intended, and who has in consequence suffered some loss or inconvenience; but I do not think that under such circumstances an action would be maintainable against the carrier; for the person to whom the goods were delivered might have refused to receive them, and when he took them in he accepted the risk flowing from a possible mistake of the carrier.

In no point of view is the present action maintainable.

BRETT, L.J. Upon consideration of the nature of the business of a telegraph company, it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; primâ facie, therefore, their only contract is with the person who employs them to send and deliver a message. In the present case the plaintiffs did not send the message, and therefore the defendants have made no contract with them. The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false. This seems to be admitted by the plaintiffs' counsel; it is urged, however, that *Collen* v. *Wright* (1) has introduced an exception to that rule; but after the argument of the defendants' counsel I have come to the conclusion that the decision in that case was founded upon a different and independent rule, which may be stated to be, that

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

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where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation. Therefore the decision in *Collen* v. *Wright* (1) does not establish an exception to the rule that an innocent misrepresentation does not form the ground of an action. Now the telegraph company, being mere messengers, did not either expressly or impliedly invite the plaintiffs to act with them in any character, and the present facts do not fall within the principle of that case.

It was further suggested that the defendants are liable by reason of negligence; but when the argument for the plaintiffs as to negligence is examined, it is found to be based upon the doctrine, that where a person has been led by the negligence of another to act under the belief of a certain state of facts and in consequence has suffered detriment, the person guilty of negligence is liable to make good that loss; but this doctrine properly applies to cases of estoppel; and the facts before us do not allow the plaintiffs to rely upon the defendants' negligence as a ground of estoppel: *Swan* v. *North British Australasian Company.* (2)

I cannot see that any liability rests upon the defendants, and therefore I think that the judgment of the Common Pleas Division should be affirmed.

COTTON, L.J. I also am of opinion that the judgment of the Common Pleas Division should be affirmed.

The authority most relied on by the plaintiffs' counsel was *Collen* v. *Wright.* (1) Now it is quite clear that the decision in that case went upon the ground that the testator of the defendants by his conduct impliedly warranted that he had the authority which he professed to have; and this is plain from the language of Willes, J., in delivering the judgment of the Exchequer Chamber. (3) Now the principle of that case cannot apply here. The

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

(2) 2 H. & C. 175; 32 L. J. (Ex.) 273.

(3) 8 E. & B. 647, at pp. 657, 658; 27 L. J (Q.B.) 215, at pp. 217, 218.

defendants did not enter into a contract with the plaintiffs, nor did they represent that they had any authority to act as agents for the plaintiffs' Liverpool house: they simply delivered the message and left the plaintiffs to act or not to act upon it, as they pleased; therefore it cannot be said that in consequence of a request by the defendants the plaintiffs undertook any liability or were induced in any way to act upon the message. There being no contract between the parties to the present suit, *Collen* v. *Wright* (1) is distinguishable.

It was further contended for the plaintiffs that the defendants were liable by reason of their negligence. It was admitted that misrepresentation alone would not have supported an action; but it was contended that, owing to the nature of the business carried on by the defendants, they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake, and that the message was sent by the persons by whom it purported to be sent. I cannot concur in this argument. A person comes into a telegraph office and writes out a message to be forwarded by the company; how can the company ascertain whether the person in whose name the message is sent has really authorized its transmission? It is impossible to suppose that the company in the ordinary course of their business warrant that the message comes from a particular person; for they would thereby make a representation, the truth of which in many cases they cannot ascertain.

Judgment affirmed.

Solicitors for plaintiffs: *G. L. P. Eyre & Co., agents for Garnett, Tarbet, & Tinne, Liverpool.*

Solicitors for defendants: *Johnsons, Upton, & Budd.*

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in Ex. Ch. 8 E. & B. 647; 27 L. J. (Q.B.) 215.

1877
Nov. 12.

[IN THE COURT OF APPEAL.]

SMITH *v.* WIDLAKE AND OTHERS.

Vendor and Purchaser—Conveyance of Fee Simple subject to Void Lease for Years—Right of Purchaser taking with Notice of Void Lease to enter upon Hereditaments held under it—Landlord and Tenant—Evidence of Tenancy from Year to Year—Effect of Acceptance of Nominal Rent for Hereditaments of Substantial Value.

A tenant for life without leasing power demised a plot of building land for the term of sixty years, from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H., who accepted rent at the rate above-mentioned from J., who was a son of the original lessee, and was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the annual value of the house and land was about 6*l.* The plaintiff having sued to recover possession of the house and land:—

Held, that as the representatives of the original lessee, under the indenture of the 29th of September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the plaintiff claiming under the grant of the fee simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year: and that the plaintiff was entitled to immediate possession of the house and land.

Prettyman's Case (2 Vern. 279, cited in *Walton* v. *Stamford*, ibid.) commented upon.

ACTION to recover possession of two cottages and a garden thereto attached. The writ was issued on the 30th of January, 1877. The defendants, Widlake and Latham, were the tenants in possession: the defendant, J. A. Thorne, defended as landlord.

At the trial, before Cockburn, C.J., without a jury, at the Bristol Spring Assizes, 1877, the following facts were proved:

By indentures of lease and release, dated respectively the 22nd and 23rd of December, 1814, being a settlement executed upon the marriage of John Harris, and Elizabeth Winifred Bird, certain lands, including a field called Eight Acres, situate in the parish of Eastdown, in the county of Devon, were conveyed to John Harris for life, with remainder to E. W. Bird for life, with remainder to the children of J. Harris and E. W. Bird, for such

estates and in such shares as they should jointly appoint, and in default of a joint appointment as the survivor of J. Harris and E. W. Bird should by deed or will appoint, and in default of any appointment to the children of J. Harris and E. W. Bird in fee as tenants in common. The settlement contained other limitations and provisions which it is unnecessary to mention; but it did not contain any power to grant leases.

The marriage was afterwards solemnized.

By an indenture of lease, dated the 29th of September, 1834, John Harris and Elizabeth Winifred, his wife, demised unto Francis Maine a plot of land, being parcel of Eight Acres, and containing about forty-two perches, from the date of the indenture for the term of sixty years, at the yearly rent of 6*d*. The lease contained amongst others a covenant by F. Maine to erect within three years a dwelling-house on the plot of land, and also a covenant by J. Harris for himself and his wife for quiet enjoyment. It also contained a power of re-entry for non-payment of rent, for omission to repair after notice, and for using the dwelling-house as a public-house. F. Maine accordingly erected a dwelling-house upon the plot of ground, which was afterwards used as two cottages, and formed the buildings sought to be recovered in the action.

John Harris died in 1835 without having exercised the joint power of appointment conferred upon him by the settlement dated December, 1814. By her will, dated July, 1844, as altered by a codicil dated November, 1854, E. W. Harris, intending to execute the power of appointment reserved to her as the survivor of her husband, devised in fee the lands conveyed by the settlement dated December, 1814, in substance, as follows: one-fifth to her son, T. B. Harris; one-fifth to her son, John Harris; one-fifth to her son, W. H. Harris; one-fifth to T. B. Harris in trust for her daughter, M. A. Gregory; and one-fifth to W. W. Gregory in trust for the children of a deceased daughter, E. W. Gregory. The devises were subject to the condition that if the devisees should wish to sell the lands during the lifetime of her son, James Harris, the offer of purchase should be first made to him at the sum of 1000*l*. The testatrix died in May, 1865, having had six childen only by her deceased husband, namely, the above-

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mentioned James Harris, T. B. Harris, John Harris, W. H. Harris, M. A. Gregory, and E. W. Gregory, deceased.

By an indenture dated the 7th of June, 1866, after reciting that T. B. Harris, John Harris, W. H. Harris, and M. A. Gregory, had determined to confirm the invalid appointment purported to be made by their mother to W. W. Gregory in favour of the children of the said E. W. Gregory, and that it had been agreed to sell to James Harris the hereditaments thereby conveyed at the price of 1000*l.*, T. B. Harris, John Harris, W. H. Harris, W. W. Gregory, and M. A. Gregory, granted unto James Harris in fee, the lands conveyed by the settlement of December, 1814.

By indenture dated the 22nd of June, 1866, James Harris mortgaged in fee the lands granted to him by the indenture dated the 7th of June, 1866, to secure a loan of 1000*l.* The deed contained the usual mortgage powers.

By an indenture dated the 2nd of April, 1874, the then mortgagees of James Harris by his direction granted, and he himself granted and confirmed, to the plaintiff in fee the lands conveyed in the settlement dated December, 1814. It was amongst other things recited that James Harris had agreed with the plaintiff "for the absolute sale to him of the hereditaments intended to be hereby granted, and the inheritance thereof in fee simple in possession free from incumbrances (except only the indenture of lease hereinafter mentioned) at the price of 1350*l.*;" in the habendum the lands were declared to be absolutely discharged from the mortgage debt of 1000*l.*, "but subject as to the house and garden mentioned in the said first schedule to a certain indenture of lease thereof for a term of sixty years, from the day of , 1834," (sic) and the covenant against incumbrances by James Harris contained an exception as to "the said indenture of lease."

The house and garden mentioned in the first schedule were the cottages and garden sought to be recovered in this action.

James Harris had after the death of his mother accepted rent for the cottages and garden at the rate of 6*d.* a year from James Mayne, a son of Francis Mayne, and by a receipt dated the 21st of July, 1872, he acknowledged the receipt from J. Mayne of "the sum 2*s.* 6*d.* for chief rent" for the cottages. The real value of the

cottages and garden was about 6*l.* a year. J. Harris was aware of the lease dated the 29th of September, 1834, and wished to treat it as valid. In August, 1876, the plaintiff demanded that the tenants of the cottages should attorn to him; but this they did not do.

At the trial Cockburn, C.J. ordered judgment to be entered for the defendants. (1)

The plaintiff appealed.

Nov. 8. *H. T. Cole, Q.C.*, and *G. Pitt Lewis*, for the plaintiff. At the commencement of the action twenty years had not elapsed since the death of E. W. Bird the last tenant for life; and therefore the plaintiff, who is tenant in fee of the cottages and garden, is primâ facie entitled to the possession thereof. The term for sixty years, being created by mere tenants for life without leasing power, is of course primâ facie void against those entitled to the inheritance; but it will be contended for the defendants that, as the grant by James Harris and his mortgagees treats the lease as subsisting, the plaintiff who claims under it cannot recover possession of the cottages and garden until the term has expired by effluxion of time or been forfeited; but this contention is plainly erroneous, for it is directly at variance with the decision in *Doe* d. *Potter* v. *Archer*. (2) It has been said that in equity the purchaser of land conveyed subject to a void lease cannot eject an occupier claiming under it, if the vendor is entitled to be indemnified by the purchaser: Sugden on Vendors and Purchasers,

(1) The only document put in at the trial on behalf of the defendants was the lease dated the 29th of September, 1834, and no other evidence as to the title of the defendant J. A. Thorne was then given; but in point of fact the original lessee Francis Mayne made a will (which, however, was never proved), bequeathing the cottages and garden in trust for six of his children; some of these children conveyed their shares to their brother James Mayne, who assigned his interest to the defendant J. A. Thorne. Francis Mayne died in 1848.

(2) 1 B. & P. 531. In this case, decided in 1796, the conveyance was by indenture and described the void lease, and it was contended that by the terms of the conveyance a valid demise was created; the Court gave judgment against this contention on the ground that the intended lessee not being a party to the indenture could not take a present interest under it; but see now as to indentures executed after the 1st of October, 1845, the first clause of s. 5 of 8 & 9 Vict. c. 106.

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ch. xxiii. s. 2, par. 4, pp. 750, 751 (14th ed.); but that doctrine does not apply here, for James Harris has no claim to be indemnified by the plaintiff. For the defendants, reliance may be placed upon *Prettyman's Case* (1), but in that case it does not appear under what circumstances the purchase was made, and it may well be that the supposed tenant for life, or perhaps the vendor, had an equity to compel the purchaser to allow the property to be enjoyed as if a valid grant had been made. The mere acceptance of rent by James Harris did not confirm the void lease: *James* d. *Aubrey* v. *Jenkins*, Buller's Nisi Prius, part 1, bk. 3, ch. ii. p. 96 b (7th ed.)

A. Charles, Q.C. (*C. Murch* with him), for the defendants. *Prettyman's Case* (1) is clearly in point, and the Court cannot give judgment for the plaintiff without overruling it. The plaintiff by the very terms of the conveyance to him had notice that the void lease existed as an incumbrance upon the freehold; and as he is now seised in fee, he can confirm the original demise, and therefore in equity he is bound to treat it as valid for the term originally created: *Taylor* v. *Stibbert.* (2) The plaintiff probably at the time of the purchase paid a less sum for the property on the ground that the cottages and gardens were held under the lease for sixty years, and the grant to him in terms only conveys a reversion, and therefore he cannot enter until the expiration of the term intended to be created.

[COTTON, L.J. It does not appear that the representatives of Francis Mayne have any remedy against James Harris, who had power to eject them; and it would follow from that argument that James Harris, and not Thorne, would be entitled to the possession for all the residue of the term.]

At all events a tenancy from year to year was created when James Harris accepted rent at the rate mentioned in the lease for sixty years; therefore the defendants were entitled to at least six months' notice to quit, and this not having been given, the present action must fail: *Doe* d. *Martin* v. *Watts.* (3)

H. T. Cole, Q.C., in reply.

Cur. adv. vult.

(1) 2 Vern. 279, cited in *Walton* v. *Stamford*, ibid.

(2) 2 Ves. Jun. 437.

(3) 7 T. R. 83.

Nov. 12. The following judgments were delivered:— 1877

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BRAMWELL, L.J. I will first dispose of the question whether the payment of rent to James Harris created a tenancy from year to year, and therefore whether the plaintiff, who claims through him, was bound to give a six months' notice to quit before he could maintain an action to recover possession of the property in dispute. The annual value of the two cottages appears to be about 6*l.*, but the rent received by James Harris was only at the rate of 6*d.* a year, and in the receipt given by him the rent is described as "chief rent." The counsel for the defendants cited *Doe* d. *Martin* v. *Watts* (1) as an authority against the plaintiff, but it is plain, upon looking into the decisions upon the question, that the payment of rent is at most only evidence of a tenancy from year to year; and upon the facts before us I am of opinion that James Harris did not accept the sum of 2*s.* 6*d.* as rent due upon a five years' occupation under a tenancy from year to year, but that he received it under the mistaken notion that he had power to confirm the void lease for sixty years. The acceptance of this sum, no doubt, would prevent James Mayne from being treated as a trespasser, and he seems to have become tenant at will in the strict sense of the term; but I do not think that a tenancy from year to year was created between him and James Harris. I may say that *Roe* d. *Brune* v. *Prideaux* (2), and *Denn* d. *Brune* v. *Rawlins* (3), entirely support the view which we take of the facts before us.

It was also argued that, as the grant to the plaintiff was made expressly subject to the void lease, he is not entitled to possession until the expiration of the term intended to be created by the indenture dated the 29th of September, 1834; but he, as grantee under the indenture dated the 2nd of April, 1874, takes all that his grantors could convey, and as the supposed term did not exist, he became seised in fee of the cottages and garden free from incumbrances, and with the right to immediate possession. For the defendants, reliance was placed upon *Prettyman's Case* (4). As to this case, I need only remark that it does not appear what the

(1) 7 T. R. 83.
(2) 10 East, 158.
(3) 10 East. 261.
(4) 2 Vern. 279, cited in *Walton* v. *Stamford*, ibid.

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circumstances of the case really were, and it may well be that the intended grantee of the estate for life had an equity sufficient to entitle him to a decree that he should enjoy the land. The defendants' counsel also relied upon a principle which appears to be established by certain decisions in equity, and seems to be of the following nature, namely, that where an ineffectual lease has been granted by a tenant for life who afterwards joins with the remainderman in selling the hereditaments to a purchaser with full notice of the agreement, the latter is liable to be restrained from ejecting those claiming under the lease; but the ground of this doctrine is that the tenant for life was bound to grant a valid interest to the lessee, and as the purchaser has notice of the contract, and takes an estate which enables him to perform it, he is bound to make good the term intended to be created; for otherwise the lessee would be able to maintain an action against the tenant for life; and in order to avoid this, equity compels the purchaser to leave the lessee in possession. But it is unnecessary to consider the extent of this doctrine, for it has no bearing upon the present facts; neither of the tenants for life who granted the lease in 1834 conveyed to the plaintiff; he does not claim through either of them; the vendor, James Harris, is not liable to an action for breach of the covenant for quiet enjoyment contained in that lease, and he cannot be sued by those who represent Francis Mayne, the original lessee, and therefore the defendants cannot successfully defend upon the principle which I have mentioned.

I am, therefore, of opinion that the judgment must be reversed.

BRETT, L.J., concurred.

COTTON, L.J. I think it clear that no tenancy from year to year was created.

It has been argued that the plaintiff cannot recover possession of the cottages and garden until the expiration of sixty years from the 29th of September, 1834, because the conveyance to the plaintiff in the recitals, in the habendum, and in the covenant against incumbrances, recognises as valid the indenture of lease dated as of that day; and that the deed must therefore be construed as confirming the void lease or creating a new lease for the remainder

of the term of sixty years. In support of this argument, reliance has been placed upon *Prettyman's Case.* (1) The facts of that case are very shortly stated. It is not reported, but merely referred to in the case of *Walton* v. *Stamford.* (2) Probably the decision was on the ground that the intended grantee for life had a claim against the vendor, and therefore against the purchaser as taking with notice. But whatever may be the true explanation of that case, I cannot recognise it as an authority in favour of the defendants' contention as to the construction and effect of the conveyance to the plaintiff. In my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose of excepting it from the covenant against incumbrances. It has also been argued that in equity, where a fee simple is granted subject to a void lease for years, the grantee will be restrained from taking any steps to put an end to the term, and will be compelled to confirm it; but upon reference to the authorities it will be found that in them the grantor of the hereditaments conveyed has contracted to create a term of years, or is liable to an action at the suit of the intended lessee if the latter is ejected from the land agreed to be demised to him, and the ground of the decisions is that the purchaser taking with notice is bound to complete the contract or to indemnify his vendor against the action, or, in other words, is bound to save him from being sued. The doctrine does not apply to the facts before us; James Harris, who conveyed to the plaintiff, is not exposed to any action at the suit of those representing the original lessee.

Judgment reversed.

Solicitors for plaintiff: *Kennedy, Hughes, & Kennedy, for R. I. Bencraft, Barnstaple.*

Solicitors for defendants: *Church, Sons, & Clarke, for J. A. Thorne, Barnstaple.*

(1) 2 Vern. 279, cited in *Walton* v. *Stamford*, ibid.
(2) 2 Vern. 279.

1877
Nov. 27.

LE TAILLEUR *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Lord Mayor's Court, London—"Carrying on Business" within the Jurisdiction—20 & 21 Vict. c. clvii. s. 12.

16 C.P.D. 487

The South Eastern Railway Company have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:—

Held, that the company do not "carry on business" within the jurisdiction of the Mayor's Court, within the meaning of s. 12 of the Mayor's Court Extension Act, 1857.

Brown v. *London and North Western Ry. Co.* (32 L. J. (Q.B.) 318) followed.

In this case Cleasby, B., had made an order that a writ of prohibition should issue to prohibit the Mayor's Court, London, from further proceeding with the action, on the ground that the Court had no jurisdiction. The action was brought to recover damages for the loss of a box which was delivered by the plaintiff at Folkestone to the defendants, who are carriers of passengers and luggage between London and Boulogne, to be carried to the last-mentioned place. It was conceded that the whole cause of action arose out of the jurisdiction of the Mayor's Court; but the question sought to be raised was whether the defendants "carried on business" within the city of London, so as to give the Mayor's Court jurisdiction under s. 12 of the Mayor's Court Extension Act, 1857 (1), as explained by the High Court of Appeal in *Hawes* v. *Paveley*. (2) The affidavits shewed that the South Eastern Railway Company have a station in Cannon Street, within the city; but that their chief office is situate at London Bridge, in the county of Surrey, where the meetings of the directors

(1) 20 & 21 Vict. c. clvii, s. 12, enacts that, "where the debt or damage claimed in any action shall not exceed the sum of 50*l*., no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof at the time of action brought, or provided the defendant or one of the defendants shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein."

Sect. 15: "No defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatever, except by plea."

(2) 1 C. P. D. 418.

are held and the general business of the company is transacted, that portion of their business which is carried on in Cannon Street being subject to the control and superintendence of the general manager and officials at London Bridge station.

Kemp, Q.C., moved to rescind the order; he referred to *Brown* v. *London and North Western Ry. Co.* (1), where it was held that a railway company carries on its business, within the meaning of 9 & 10 Vict. c. 95, s. 60,—the language of which is substantially the same as that of s. 12 of the Mayor's Court Extension Act, 1857,—only at the principal station where the general superintendence of the whole concern is centred, not at any station, however large, where the local management of any portion of the line is conducted subject to the supervision of the general manager at the principal station. But he sought to distinguish that case from the present, inasmuch as the object of the County Courts Act was to create a limited jurisdiction, whereas the object of the statute now under consideration was to improve and extend the practice and jurisdiction of the Mayor's Court. He further submitted that Cannon Street station was in one sense a terminal station (2), and he referred to the language of Crompton, J., in giving judgment in *Brown* v. *London and North Western Ry. Co.* (3): "I am inclined to think that there may be cases in which the business of a railway company may be held to be carried on at two places; for instance, suppose a terminus at two places, like Liverpool and Manchester, and the meetings of the directors held as much at one place as the other, I do not see why the business may not be said to be carried on at both."

Bremner, for the defendants, was not called upon.

GROVE, J. I am of opinion that this appeal from the order of my Brother Cleasby must be dismissed. I can see no distinction

(1) 32 L. J. (Q.B.) 318; and see *Shiel* v. *Great Northern Ry. Co.* 30 L. J. (Q.B.) 331.

(2) The plaintiff's affidavit also stated that the company were possessed of the City Terminus Hotel in Cannon Street, where, besides their business of carriers, they carried on the business of hotel and restaurant-keepers; and that they also carried the post mails, receiving and delivering them at the Cannon Street station.

(3) 32 L. J. (Q.B.) at p. 321.

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LE TAILLEUR v. SOUTH EASTERN RAILWAY CO.

between *Brown* v. *London and North Western Ry. Co.* (1) and the present case. The words in both statutes are precisely the same, so far as this question is concerned, and must receive the same construction in both. I observe that Crompton, J., in that case says: "I am quite satisfied that, if a prohibition had been applied for, it ought to have gone; and the question in the present form is precisely the same." I feel bound by that case, and I think the decision the Court of Queen's Bench came to there was quite right.

LINDLEY, J. In some sense, no doubt, the South Eastern Railway Company may be said to carry on business within the city of London; but the question is whether they do so in the sense in which that phrase was used in s. 12 of the Mayor's Court Extension Act, 1857. The very same phrase, it seems, was used in an Act of a substantially similar kind, and the conclusion come to was that such a carrying on business as is here described was not within the section. It was there said that business must mean the general, or as it is sometimes called, the administrative, business carried on at the chief or principal station. Here the general business of the company is not carried on within the city. There being no material distinction between the case cited and the present, the result must be the same. The motion must be refused, with costs.

Motion refused.

Solicitors for plaintiff: *J. C. Fisher & Co.*
Solicitor for defendants: *W. R. Stevens.*

(1) 32 L. J. (Q.B.) 318.

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Nov. 24.

County Court—Cause sent for Trial under 19 & 20 *Vict. c.* 108, *s.* 26—*Right to a Jury.*

Where a cause is sent to a county court for trial, under 19 & 20 Vict. c. 108, s. 26, and no special terms are imposed by the order, the parties are entitled (the demand being of sufficient amount) to have it tried by a jury; and this notwithstanding a second trial is directed in a case where the first trial was by the judge, without a jury.

THIS action, which was commenced in the Common Pleas Division, was sent for trial at the Reigate county court under 19 & 20 Vict. c. 108, s. 26. (1) At the trial the deputy judge negatived the plaintiff's claim, and decided that the defendant was entitled to recover 20*l.* upon a counter-claim; and the registrar certified to the superior Court accordingly. The plaintiff obtained an order for a new trial, the rule being silent as to the mode of trial.

The plaintiff three clear days before the day appointed for the second trial duly demanded to have the case tried by a jury, and paid the proper fee for that purpose to the registrar. (2) But, when the case was called on, the deputy judge, although a competent number of jurymen were in attendance, refused to allow them to be sworn, and insisted upon the trial proceeding, as upon the first occasion, without a jury, because the rule for a new trial was silent upon the subject. A verdict was again found for the defendant, and the registrar certified accordingly, but in a very special form.

Sidney Woolf obtained a rule to shew cause why the certificate of

(1) Sect. 26: "Where in any action of contract brought in a superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into Court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a superior Court, on the application of either party after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the masters' office of such superior Court, and judgment in accordance with such certificate may be signed in such superior Court."

(2) 9 & 10 Vict. c. 95, ss. 70, 71.

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the registrar of the county court, and the judgment (if any) should not be set aside and a new trial had, on the grounds, 1. of the refusal of the deputy judge to allow the action to be tried by a jury; 2. that the certificate was irregular and void for certain specified reasons; 3. that the verdict was against the weight of evidence.

Cook, for the defendant, took a preliminary objection, viz. that the judge's notes had not been obtained, counsel not having been present at the trial; and in support of the objection he referred to Pollock's County Court Practice, 8th ed. p. 297, and to *Taylor* v. *Holt* (1), *Dene* v. *Sawyer* (2), and *Welsh* v. *Mercer*. (3)

Woolf submitted that the notes,—which the deputy judge had refused to furnish, alleging that he had taken none,—were unnecessary upon the first two grounds mentioned in the rule, and he elected to abandon the other ground.

Cook. The deputy judge of the county court was quite right in refusing to allow a jury on the second trial. Under 19 & 20 Vict. c. 108, s. 26, the record remains in the superior Court, the issue or issues merely being sent down to the county court to be tried; and there cannot be a jury unless the order contains a direction to that effect: *Wheatcroft* v. *Foster*. (4) It is otherwise where an action of contract is sent before issue joined under s. 7, or an action of tort under s. 10, of 30 & 31 Vict. c. 142 (5); for, in that case, the cause becomes for all practical purposes a county court cause, just as if it had been originally commenced in the

(1) 3 H. & C. 454, n. (*a*).

(2) 26 L. T. 646.

(3) Law Rep. 8 Ex. 71.

(4) E. B. & E. 737; 27 L. J. (Q.B.) 277.

(5) Sect. 7: "Where in any action of contract brought or commenced in any of the superior Courts of common law the claim indorsed on the writ does not exceed 50*l*., or where such claim, though it originally exceeded 50*l*., is reduced by payment, admitted set-off, or otherwise, to a sum not exceeding 50*l*., it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the county court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall

county court; and the superior Court loses all control over it, except upon appeal. (1)

[GROVE, J. Where no terms are imposed, it seems reasonable that the trial should take place according to the ordinary course of the county court.]

There having been no jury on the first trial, it would seem to be in the judge's discretion to say whether or not there should be a jury on the second: see the County Court Rules of 1875, Order XVI, r. 42.

Woolf, in support of the rule. *Reg.* v. *Harwood* (2) is an express authority that, where a cause is heard before a county court judge without a jury, and a new trial is afterwards granted *generally* at the instance of the plaintiff, the latter may demand to have the case tried by a jury on the second occasion. The mode of procedure must be governed by the practice of the court in which the trial takes place; and that is regulated by 9 & 10 Vict. c. 95, ss. 70, 71, the Rules of 1868, rules 104, 105, and the Rules of 1875, Order XVI, rules 1 and 2; though the application for a new trial must be made in the superior Court: *Balmforth* v. *Pledge*. (3) "When," says Blackburn, J. (4), "the trial of the cause has taken place, the power of the county court is over, and the registrar has simply to certify the result of the trial; and, if the case is tried by the judge alone, without a jury, there may be practical difficulties as to moving for a new trial, but these difficulties are not sufficient to induce me to say that the jurisdiction of the superior Court to grant a new trial is taken away." (5) See also *Fletcher* v. *Baker*. (6)

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be sent by post or otherwise by the registrar to both parties or their attorneys, and the cause and all proceedings therein shall be heard and taken in such county court as if the action had been originally commenced in such county court: and the costs of the parties in respect of proceedings subsequent to the order of the judge of the superior Court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings previously had in the superior Court shall be allowed according to the scale in use in the latter Court."

(1) See *Blades* v. *Lawrence*, Law Rep. 9 Q. B. 374.

(2) 22 L. J. (Q.B.) 127.

(3) 7 B. & S. 425; Law Rep. 1 Q. B. 427.

(4) Law Rep. 1 Q. B. 429.

(5) See *Ipswich Gas Light Co.* v. *Norman*, 7 B. & S. 847.

(6) Law Rep. 9 Q. B. 370.

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Cook, contrà. The rules and practice of the county court have no application to proceedings here: *Wheatcroft* v. *Foster*. (1) If any terms are to be imposed on sending a cause down for trial in the county court, it must be done in the order of the judge who sends it down. If this had been a case remitted under s. 7 of 30 & 31 Vict. c. 142, it could not have been denied that the plaintiff was entitled to have a jury: but, under s. 26 of 19 & 20 Vict. c. 108, the case never did become a county court cause; the superior Court never lost control over it, therefore the case relied on of *Reg.* v. *Harwood* (2) does not apply. In the absence of any special direction to the contrary in the rule by which the new trial was ordered, the trial on the second occasion could only be in the same manner as the first trial had taken place, viz. by the judge, without a jury.

GROVE, J. I must say it is with considerable regret that I give way to the argument for the plaintiff and to the authority of *Reg.* v. *Harwood*. (2) It is much to be regretted that the parties should be put to the inconvenience and expense of going down to a third trial on the ground of the refusal of the deputy judge to allow a jury to be sworn: but we must act upon the law as we find it. Where no terms are imposed by the order sending the cause down to be tried in the county court, it could not be tried otherwise than according to the practice of that court. At first I was inclined to think that, as the former trial took place before the deputy judge without a jury, upon the rule as framed the second trial must in like manner take place without a jury. But the case of *Reg.* v. *Harwood* (2) gets rid of that difficulty; and, as that is a decision of a Court of co-ordinate jurisdiction, we are bound by it. That case really decided this very point. In the absence of special terms in the rule directing a new trial, it appears to me that the trial must take place according to the usual course and practice of the county court, by which it is the right of the parties to have a jury if they think fit. The same argument seems to have been urged in *Reg.* v. *Harwood* (2) as has been urged here: but Erle, J., said: "The ground taken by the county court judge was, that he was impowered to refuse to try the case by a jury. I

(1) E. B. & E. 737; 27 L. J. (Q.B.) 277. (2) 22 L. J. (Q.B.) 127.

think that on that point he was wrong. The right of the parties being to have a jury, it was the duty of the judge to have postponed the trial, if necessary, until a proper jury could be summoned. The parties have the same right on a second as they have on the first trial to require a jury to be summoned." I think after that case we have no option but to order a new trial.

LINDLEY, J. I am of the same opinion. This was an action which was originally commenced in the superior Court, and was sent for trial in the county court of Reigate under s. 26 of 19 & 20 Vict. c. 108, which impowers a judge of a superior Court in a case like the present, on the application of either party after issue joined, "in his discretion, and on such terms as he shall think fit," to order the cause to be tried in any county court which he shall name. The clause goes on to enact that "thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the masters' office of such superior Court, and judgment in accordance with such certificate may be signed in such superior Court." The first question which arises, is, according to which practice and procedure the trial is to take place,—that of the superior Court, or that of the inferior Court. Now, the judge of the county court can only try the case according to the practice and procedure of the county court. That being so, our decision must be governed by *Reg.* v. *Harwood* (1), where it was held that the parties have a right to have a jury, even on a new trial although the first trial took place before the judge alone, without a jury. There is no escape from that result. The plaintiff was therefore entitled to have his cause tried by a jury, and the rule will be made absolute for a new trial, the costs to abide the event of the third trial.

Rule absolute.

Solicitors for plaintiff: *Nicol, Son, & Jones.*
Solicitor for defendant: *King, Walbrook.*

(1) 22 L. J. (Q.B.) 127.

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Nov. 27.

PHILLIPS *v.* HENSON.

"Lodger"—Lodgers' Goods Protection Act, 1871, 34 & 35 *Vict. c.* 79.

8 QBD 199
9 QBD 244
24 S.J.
230

By an agreement in writing the plaintiff hired from F. rooms in a house held by her under an unexpired lease from the defendant, for which the plaintiff was to pay F. 27*l.* 10*s.* per quarter, she paying rates and taxes, and keeping the premises in repair. The rooms so hired by the plaintiff substantially constituted the whole house, F. only retaining possession of the housekeeper's room on the basement and of two or three empty attics and a stable. Rent being due from F. to the defendant, the latter distrained and sold household furniture belonging to the plaintiff, who, relying upon the provisions of the Lodgers' Goods Protection Act, 1871, sued him for an illegal distress:—

Held, that, although the agreement under which he held might make him an "undertenant," the plaintiff was not the less a "lodger" entitled to the protection of the statute.

ACTION for an illegal distress.

The plaintiff occupied rooms in a house under the following agreement:—

Memorandum of agreement made this 18th day of December, 1875, between George Phillips, 3, Park Place, Clarence Gate, of the one part and Jane Ffolkes, 3, Park Place, Clarence Gate, of the other part.

The said Jane Ffolkes doth agree to let unto the said George Phillips, and the said George Phillips doth agree to take, from the 25th day of December instant, for quarterly, and, unless either of the said parties shall give to the other three months' notice to quit previous to the end of the said term, but not otherwise, from thence afterwards for another quarter year, and so on from quarter to quarter while and until one of the said parties shall give to the other three months' notice to quit, all that kitchen, dining rooms, drawing rooms, second floor, and rooms on third floor, together with the appurtenances, at and under the quarterly rent or sum of 27*l.* 10*s.*, the same to be paid on the day of the expiration of each quarter of a year during the term or terms aforesaid, and the first payment to commence on the 25th day of March, 1876, next; which said quarterly rent or sum of 27*l.* 10*s.* the said George Phillips doth agree to pay accordingly free and clear of and from all deductions whatsoever: and the said Jane Ffolkes doth also agree to pay all taxes and assessments for the said premises, and keep the same in good and sufficient repair during the term or terms aforesaid, damage by fire or other inevitable accident only excepted. As witness, &c.

The rooms so occupied by the plaintiff under this agreement substantially constituted the whole of the house, Mrs. Ffolkes, who was the sister of the plaintiff's wife, only reserving to herself the housekeeper's room in the basement (where she slept, on a bed lent

to her by the plaintiff), the empty attics, and a stable which she let. Mrs. Ffolkes had a lease of the house from the defendant for an unexpired term at a rent of 105*l.* per annum, and with a covenant amongst others not to underlet without the consent of the lessor. She being in arrear with her rent to the defendant, he, also having a bill of sale upon her furniture, had seized and sold the whole of it, so that the house was entirely destitute of furniture when the plaintiff (who had unsuccessfully attempted to get the defendant's consent to an assignment of the lease to him) came into possession under the agreement above set out.

Rent becoming due to the defendant from Mrs. Ffolkes, he on the 29th of March, 1876, distrained the goods upon the premises, whereupon Phillips made a declaration before a magistrate under the Lodgers' Goods Protection Act, 1871 (1), that the

(1) 34 & 35 Vict. c. 79. Sect. 1 enacts that, "if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and, if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanor."

Sect. 2. "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order

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goods so seized were his exclusive property, and that he had paid all the rent due from him to Mrs. Ffolkes. The magistrate declined to interfere, and the defendant caused all the goods to be carried away and sold, the greater part of them being bought by Phillips.

At the trial before Manisty, J., at the last Easter Sittings in Middlesex, it was amongst other things contended on the part of the defendant that the alleged letting to the plaintiff was a mere colorable device on his part to obtain possession of the house without exposing his goods to seizure; and, further, that the agreement between him and Mrs. Ffolkes amounted in law to a demise or underletting, and did not put him in the position of a "lodger" so as to entitle him to avail himself of the Lodgers' Goods Protection Act.

The jury found a verdict for the plaintiff, damages 300*l.*

Murphy, Q.C., in Easter Sittings, obtained a rule to enter judgment for the defendant, or for a new trial on the ground of misdirection on the part of the learned judge "in telling the jury that the plaintiff was a lodger within the meaning of the Act of 1871, and in not explaining to them the defendant's rights as landlord to re-enter, and in not telling them to find for the defendant if they thought the agreement of December was entered into collusively for the purpose of depriving the defendant of his rent, not with the intention of creating a real relation of landlord and lodger; and also upon the ground that the verdict was against the evidence, and the damages excessive;" and also upon affidavits.

Kemp, Q.C., and *Gibbons*, shewed cause. There was no misdirection, and the verdict was warranted by the evidence. The plaintiff was clearly a lodger within the meaning of 34 & 35 Vict. c. 79. It is not easy to give any very precise definition of "lodger." Perhaps the best is that suggested by Bovill, C.J., in

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for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

Sect. 3. Payment by the lodger to be a valid payment on account of rent due from him to his immediate landlord.

Thompson v. *Ward* (1),—"Generally speaking, a lodger is a person whose occupation is of a part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or a dominion over the house generally or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord." It was suggested at the trial that this was a collusion between the plaintiff and Mrs. Ffolkes to prevent the landlord from having recourse to the plaintiff's goods to obtain payment of his rent,—that it was an attempt to evade the law. Be it so: the plaintiff's property in his goods remains; and he had a right to resort to any legal means to protect them. The facts were for the jury; and they were the proper persons to assess the damages. The value of the goods seized is not necessarily the measure of damage in such a case as this: the jury may take into consideration all the circumstances attending the seizure.

Murphy, Q.C., and *G. Shaw*, in support of the rule. The demise here was substantially of the whole house: the occupation of a small portion by Mrs. Ffolkes was colorable and with a view to defeat the landlord of his remedy for rent. The plaintiff was therefore an undertenant, and not a lodger, so as to be within the protection of the statute. None of the definitions of "lodger" attempted by the several judges who have been called upon to consider the matter can be relied on as at all satisfactory: see *Fludier* v. *Lombe* (2), per Lord Hardwicke; *Monks* v. *Dykes* (3), per Parke, B.; *Allan* v. *Overseers of Liverpool* (4), per Blackburn, J.; *Reg.* v. *St. George's Union* (5); *Smith* v. *St. Michael's, Cambridge* (6); *Barnes* v. *Peters.* (7) The registration and the rating cases depend altogether upon different considerations. This plaintiff clearly had such an estate as would have enabled him to maintain trespass: Com. Dig. *Trespass* (B.) The summing-up of the learned judge was not calculated to invite the attention of the

(1) Law Rep. 6 C. P. 327, 360.
(2) Cas. t. Hard. 307, 308.
(3) 4 M. & W. 567.
(4) Law Rep. 9 Q. B. 180.
(5) Law Rep. 7 Q. B. 90.
(6) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(7) Law Rep. 4 C. P. 539.

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jury to the true question which they had to try, viz. what was the real relation in which the plaintiff stood towards Mrs. Ffolkes: and, if the case was properly left to them, the verdict was manifestly against the weight of evidence. The statute only intended to afford protection to a limited class of occupiers, viz. lodgers, whose occupation is of such an uncertain and temporary character, as to make it impossible for them to protect themselves by those inquiries which a person would naturally make before hiring a house. At all events, the damages were excessive.

Cur. adv. vult.

Nov. 27. GROVE, J. In this case a landlord distrained for rent in arrear upon household furniture which belonged to the plaintiff, who claimed to be a lodger within the Lodgers' Protection Act, 34 & 35 Vict. c. 71. The facts were in substance as follows: Mrs. Ffolkes, being tenant of the defendant for a term of years, let a part,—a large part,—of the house to the plaintiff, her brother-in-law, under a written agreement, whereby she agreed to let and the plaintiff agreed to take from the 25th of December, "for quarterly," which we may assume to mean for one quarter, and so on from quarter to quarter while and until one of the parties should give to the other three months' notice to quit, all that kitchen, &c. (describing them) at and under the quarterly rent or sum of 27*l.* 10*s.*, payable on each quarter day; and Mrs. Ffolkes agreed to pay all taxes and assessments for the premises, and to keep them in repair. It was contended at the trial and again before us that this agreement created an under tenancy, and not the relation of landlady and lodger between the parties. It is not necessary for us to decide what precise relation was created between the parties by this instrument: it may be that the plaintiff became both undertenant and lodger. He lived in the house, and he brought his furniture there: and the question is, not whether the agreement might create a tenancy between the parties, but whether it is inconsistent with the plaintiff's being a "lodger." There is no definition of a lodger given in the Act: and, from the cases which have been cited, it is clear to my mind that the meaning of the word "lodger" must vary according to the purpose for which it is used. We had a few days ago to

consider what was "keeping a common lodging-house." (1) The object of the statutes which gave rise to that question (2) was, to provide an effectual supervision over common lodging-houses, to enforce cleanliness and prevent disease. That of the statute now under consideration was, to protect persons living in houses, not under contracts with the landlord, but making subordinate bargains with those who hold under him, from having their goods seized to satisfy the claim of the landlord for rent due to him from his immediate tenant. It may be that there were other objects; but the most important object of the Act undoubtedly was, to protect the goods of persons between whom and the landlord there is no direct privity. In case of seizure, the person whose goods are seized may go before a magistrate and make a declaration that he is only a lodger and that the goods are his property, and so get them released upon paying what rent, if any, may be due from him to his immediate landlord. Without, therefore, deciding what this agreement might amount to, if the question were whether or not the plaintiff had such an estate as would enable him to maintain trespass for an invasion of his rights, I am of opinion that there is nothing in it which is inconsistent with his being a lodger. As to the alleged misdirection, having read the whole of the summing-up of the learned judge, I am unable to discover anything in it which I can find fault with. If he did not in terms call the attention of the jury to one of the contentions on the part of the defendant, he used terms so very near it that the jury could not possibly have been misled. As to the evidence, there certainly were some suspicious circumstances in the case; but the whole was for the jury, and the judge does not report to us that he is dissatisfied with the verdict. I however entertain a strong impression that the damages are excessive; and the learned judge reports to us that he thinks that a matter which we ought to deal with. It seems to me that there was nothing to warrant a verdict for 300*l.*; and I think that, unless the plaintiff will consent to reduce it to 150*l.*, there should be a new trial.

(1) In *Langdon* v. *Broadbent*, decided on 23rd November, 1877.

(2) Common Lodging Houses Acts, 1851 and 1853, 14 & 15 Vict. c. 28, and 16 & 17 Vict. c. 41.

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LINDLEY, J. I am of the same opinion. There certainly is considerable difficulty in determining who is a lodger within the meaning of this Act. It is said that this plaintiff was an undertenant, and not a mere lodger. Looking at the main object of the Act, I am not satisfied that an undertenant who resides with his family and servants in certain rooms of a house other rooms of which are at the same time occupied by the tenant and his family, cannot be a lodger; though probably the Act would not apply to an undertenant who has the exclusive possession and occupation of an entire house. I incline to think that such a letting as this would be a breach of a covenant not to underlet: letting to a mere lodger would not: *Doe* d. *Pitt* v. *Laming*. (1) But I cannot say that this person was not a lodger within the meaning of the Act. I think there was no misdirection, and that there was evidence upon which the jury might properly find a verdict for the plaintiff: but, as to the damages, I agree with my Brother Grove that they are excessive.

The plaintiff consenting to reduce the damages to 150*l*., the rule was

Discharged.

Solicitor for plaintiff: *G. H. Finch.*
Solicitor for defendant: *J. C. Tompkins.*

Dec. 1.

[IN THE COURT OF APPEAL.]

JOHNSON *v.* THE CREDIT LYONNAIS COMPANY.
JOHNSON *v.* BLUMENTHAL.

Factors Acts—Agent intrusted with the Possession of Goods—Agent Broker and also Merchant—Goods left in possession of Paid Vendor—Pledge— 6 *Geo.* 4, *c.* 94, *s.* 2.

H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained

11 C.L.D. 63. 50 L.J. Ch. 667.

(1) 4 Camp. 77.

advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh dock warrants from the dock company :—

Held, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants.

APPEAL by the defendants, the Credit Lyonnais Company, from a judgment of Denman, J., in favour of the plaintiff (1) after trial without a jury; and also appeal of the defendant Blumenthal from a judgment of Field, J., in favour of the plaintiff after trial with a jury.

These cases were by order argued together; the facts were the same in both as well as the questions of law arising thereupon. The facts are fully set out in the report in the Court below, and are sufficiently stated in the judgment of the Court of Appeal and in the headnote above.

1877. June 9, 27, 29. *Thesiger, Q.C.*, and *Bigham* for the plaintiff in each case.

Benjamin, Q.C., and *Woolf* (*Watkin Williams, Q.C.*, with them), for the defendants the Credit Lyonnais Company.

Philbrick, Q.C., and *Woolf*, for the defendant Blumenthal.

Two questions were discussed. First, whether Hoffmann was an agent intrusted with the documents of title relating to the tobacco, within the meaning of 6 Geo. 4, c. 94, s. 2, and 5 & 6 Vict. c. 39, s. 1. Secondly, whether the conduct of the plaintiff by leaving the indicia of title in Hoffman's possession—he being a tobacco dealer—gave him an apparent right to deal with the tobacco as his own, and whether the plaintiff was thereby estopped from saying that the tobacco was his.

The arguments were the same in both cases, and are fully noticed in the judgments.

In addition to the cases mentioned in the judgments the following cases were cited. On the first point, *Baines* v. *Swainson* (2), *McEwen* v. *Smith* (3), *Monk* v. *Whittenbury* (4), *Phillips* v. *Huth* (5),

(1) 2 C. P. D. 224.
(2) 4 B. & S. 270; 32 L. J. (Q.B.) 281.
(3) 2 H. L. C. 309.
(4) 2 B. & Ad. 484.
(5) 6 M. & W. 572.

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Hatfield v. *Phillips* (1), *Wood* v. *Rowcliffe* (2), *Heyman* v. *Flewker* (3), the judgment of Lord Westbury in *Vickers* v. *Hertz.* (4) On the second point, *Rumball* v. *Metropolitan Bank.* (5)

Cur. adv. vult.

Dec. 1. The following judgments were delivered :—

COCKBURN, C.J. These cases come before us on appeal: the first from a judgment of Mr. Justice Denman, after a trial before himself without a jury; the second from a judgment of Mr. Justice Field after a trial with a jury.

The facts, as well as the questions of law arising thereupon, were the same in both actions. The facts were as follows :—

One Hoffmann, a broker in the tobacco trade, but who also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the warehouses of the St. Katharine's Dock Company, receiving the usual dock warrants; and the tobacco was entered in the books of the company as that of Hoffmann.

This tobacco Hoffmann sold to the plaintiff, who carried on the business of a tobacco manufacturer at Bolton, in Lancashire; but it not suiting the plaintiff's purpose to take the tobacco out of bond, which would have involved the necessity of paying the duty before he wanted the tobacco, he did what it appears is frequently, but not always, done in the tobacco trade by purchasers, in order to avoid the immediate payment of the duty: he left the tobacco in bond in the name of Hoffmann, and left the dock warrants in Hoffmann's hands, and took no steps to have any change made in the books of the dock company as to the ownership of the goods.

According to the plaintiff's statement, he was ignorant of the fact that, when goods are thus deposited in the warehouses of the dock company, dock warrants are issued to the party depositing, which represent the goods, and are capable of being transferred, so as to enable the transferee to obtain possession of the goods.

Being thus the ostensible owner of the tobacco, Hoffmann fraudulently obtained advances, on the pledge of a portion of it,

(1) 12 Cl. & F. 343.
(2) 6 Hare, 183.
(3) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.
(4) 2 H. L. (Sc.) p. 118.
(5) 2 Q. B. D. 194.

from the Credit Lyonnais Company, the defendants in one of these actions, and from Blumenthal, the defendant in the other; both these parties acting in perfect good faith, under the belief, induced by his being in possession of the goods and of the indicia of ownership, that Hoffmann was the owner of the tobacco. Each of the defendants on the completion of the transaction, proceeded to do that which, as it seems to me, the plaintiff, as a matter of common prudence, should have done. They caused the entry of the goods to be transferred from the name of Hoffmann to their own in the books of the dock company, and took fresh dock warrants from the company, giving up the former ones. The transactions between Hoffmann and the defendants were wholly unknown to the plaintiff. He further stated, as I have already mentioned, and the statement does not appear to have been questioned, that he was unaware of the practice of giving dock warrants as evidence of the title of the party to whom they are given, or of the transfer of such warrants on alienation of the property.

Upon this state of facts, Mr. Justice Denman, in the action against the Credit Lyonnais Company, gave judgment in favour of the plaintiff for the value of the tobacco pledged to the defendants. In the action against Blumenthal—the defence on the ground of estoppel or negligence having been abandoned by the counsel for the defendant—Mr. Justice Field put the question to the jury whether authority, or ostensible authority, had been given by the plaintiff to Hoffmann to deal with the goods as owner, or to pledge them as agent; and on the jury answering in the negative gave judgment in like manner for the plaintiff.

Two questions are raised by the defendants: the first, whether the case comes within the Factors Acts; the second, whether the conduct of the plaintiff, in leaving the indicia of title in Hoffmann's hands, and thus enabling him to obtain money on the security of this tobacco, has been such as to disentitle him to recover its value from the defendants.

Upon the first question, namely, whether the case comes within the Factors Acts, I entertain no doubt. I consider it to be settled by the authority of decided cases; but I may add that if the question had presented itself now for the first time, it being clear to

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my mind that Hoffmann was not "intrusted" with these goods, or with the documents of title relating to them, as agent to sell or consign, or indeed as agent in any sense, but stood only in the position of a paid vendor remaining in possession of the thing sold till it suited the convenience of the buyer to accept delivery, I should have had no hesitation in arriving at the same conclusion.

The other question, namely, whether the plaintiff, having not only by leaving the goods in the possession of Hoffmann, but also by leaving with him the indicia of ownership, enabled him to dispose of the goods, as apparent owner, to the defendants, can recover the value from them, is a far more difficult question, and one on which I have entertained considerable doubt.

That Hoffmann having thus, by being left in undisturbed possession of the goods and the indicia of ownership—there having been nothing to raise a doubt as to the latter, or any means open to the defendants to ascertain the fact—been enabled to defraud one of two innocent parties, when the question arises as to which of them the loss should fall upon, in reason and justice the loss ought to fall on him who might have prevented, and as a matter of common prudence ought to have prevented, the possibility of the fraud, is what I cannot bring myself to doubt. And I am strongly fortified in this view by the fact that, as soon as the decisions here appealed from had been made public, the legislature by statute (40 & 41 Vict. c. 39) at once proceeded to settle the question in that view in the future by applying the protection given by the Factors Acts to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present. Whether, prior to and independently of such legislation, the law as it stood would have afforded protection is a different matter. I have come, though, I confess, with reluctance, to the conclusion that, as the law stood, this action could not be resisted, and consequently that this appeal must be dismissed.

The case for the plaintiff rests on the general proposition of law —which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest

the owner of his rights as against the third party, however innocent in the transaction the latter party may have been.

The defendants, on the other hand, insisted on two grounds as taking the case out of the general rule: first, that the plaintiff, by leaving the possession of the goods and the indicia of property in the hands of Hoffmann, had enabled the latter to pledge the goods to them, and was therefore estopped from denying the right of Hoffmann so to deal with them; secondly, that, even if the property in the tobacco still remained in the plaintiff, so as to entitle him to recover its value, on the other hand, the plaintiff had in the conduct in question been guilty of negligence by which the defendants had been induced to deal with Hoffmann as the owner of the tobacco, and to pay him for it; by reason of which they were entitled to recover back the amount by way of counterclaim, or what would come to the same thing, to set it off in the present action.

There have been, no doubt, decisions which would at first sight appear to favour the first of these contentions, but they are, I think, distinguishable from the case before us. In *Pickering* v. *Busk* (1) the purchaser of hemp lying at a wharf had himself directed the hemp to be transferred in the wharfinger's books into the name of the broker who had bought it for him. It was held that from this an authority to the broker to sell might be implied, though no such authority had in fact been given, and that his sale and receipt of the money, though fraudulent as to his principal, nevertheless bound the latter. "The sale," said Lord Ellenborough, "was made by a person who had all the indicia of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name." And Bayley, J., says: "It may be admitted that the plaintiff did not give the broker any authority to sell. But an implied authority may be given; and if a person puts goods into the custody of a vendor, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell

(1) 15 East, 38.

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them." This language might appear to be applicable to the present case; but there is a material difference between the two cases. In *Pickering* v. *Busk* (1) the purchaser had himself expressly directed that the goods should be entered in the broker's name. In the present case the plaintiff has simply remained passive. He has left things as he found them at the time of his purchase.

The same observation will apply to the case of *Boyson* v. *Coles* (2), a case which arose prior to the passing of 6 Geo. 4, c. 94, and in which goods had been pledged by a person alleged to have been a factor, but in which the defence was that the plaintiffs had dealt with the broker as purchaser, or, at all events, by the documents which had passed between them had enabled him to appear as such to others, Lord Ellenborough left to the jury whether the plaintiffs had dealt with the parties pledging as purchasers of the goods, or as brokers, directing them that, "if as brokers, the latter had no right to pledge the goods to the defendant, unless the jury considered that the plaintiffs had armed them with such indicia of property as to enable them to deal with it to others as their own?" A new trial was applied for, but this ruling was not quarrelled with. On the argument on the rule, Abbott, J., approves of the questions left to the jury, one of them he says being "whether the plaintiffs had by their own acts enabled Coles Brothers (the brokers) to hold themselves out as the purchasers, and thus to induce the defendant to advance his money on the credit of the goods."

In *Dyer* v. *Pearson* (3), where a similar question arose, Abbott, C.J., told the jury "that if a man takes upon himself to purchase from another under circumstances which ought to have excited his suspicion, and induced him to distrust the authority of the person selling, such a purchaser could not hold the property if it afterwards turned out that the person from whom he bought had no authority to sell; and he left it to the jury to say, whether the defendant had purchased under circumstances which would have induced a reasonable, prudent, and cautious man to believe that Smith, of whom he purchased, had authority to sell.

(1) 15 East, 38. (2) 6 M. & S. 14.
(3) 3 B. & C. 38.

If they thought that he had purchased under such circumstances, they were to find for the plaintiffs." This ruling was held to amount to misdirection, and a new trial was granted. "The question," says the Chief Justice, "which I left to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is that a man who has no authority to sell, cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz., the case of sales in market overt. This was not a sale in market overt, and therefore does not fall within the exception. Now this being the rule of law, I ought either to have told the jury, that even if there was an unsuspicious purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs; or I should have left it to the jury to say, whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property, then perhaps a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendants, and that question, if it arises upon the evidence, ought to have been submitted to the jury."

It is to be observed that the Chief Justice here states the proposition in anything but positive terms. No further mention of the case appears in the reports, and we are consequently not informed what became of it on the new trial, the rule for which was made absolute. Mr. Chitty, however, in his work on Contracts, (10th ed. p. 355), referring to these cases, writes thus: "It is said that if the real owner of goods suffers another to have possession thereof, or of those documents which are the indicia of property therein, thereby enabling him to hold himself forth to the world as having not the possession only but the property, a sale by such a person without notice will bind the true owner." But he adds this qualification: "But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken primâ facie to have had the right to sell." The law, as thus

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stated, was approved by the Court of Exchequer in *Higgins* v. *Burton*. (1) But the present question was not before the Court in the latter case, the question there being whether a person who had bought goods in the name of A., fraudulently representing himself as A.'s agent, and had thus obtained possession of the goods, could pledge them so as to give a title to the pledgee as against the real owner. And it was held, following *Kingsford* v. *Merry* (2), that he could not.

Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor.

The doctrine established in *Pickard* v. *Sears* (3) and *Freeman* v. *Cooke* (4), and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. Here it is clear that the plaintiff had no knowledge whatever of the advances obtained by Hoffmann on the security of the goods, or even of the existence of the dock warrants which made Hoffmann appear to be the owner. It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied.

The defence, founded on the allegation of negligence remains to be considered.

That the plaintiff, in omitting to have the goods transferred to

(1) 26 L. J. (Ex.) 342.
(2) 11 Ex. 577.
(3) 6 A. & E. 469.
(4) 2 Ex. 654; 18 L. J. (Ex.) 114.

his own name, and to have the dock warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt, and I am strongly confirmed in this view by the passing of the recent statute, as the legislature must have proceeded on the view that there is default in the owner in such a case.

It appears to me no answer to say that he was ignorant of dock warrants being issued in respect of goods warehoused in the docks. A man who deals in a given market should make himself acquainted with the course of business prevailing there. Moreover, he knew that the tobacco was warehoused in the bonded warehouses of the company. He must have known that the goods would stand in the books of the company as the goods of Hoffmann. He should at least have taken care to have them transferred into his own name. It is no answer, as it seems to me, to say that it is common in the trade for buyers of tobacco to leave the goods and the indicia of title in the hands of the seller, and that hitherto no dishonest advantage has been taken of the opportunity thus afforded for fraud. The mercantile community are as a body honourable men; but experience unfortunately tells us that frauds occasionally happen where they might least be expected. The case of *Goodwin* v. *Robarts* (1), which was recently before the courts, affords an example, and other instances of a similar character occur in the books. In the majority of instances this occurs, as in this case, from the carelessness of those concerned, and the omission to take the precautionary measures which the regular course of business would prescribe. This manner of proceeding is not the less imprudent and negligent because a number of persons, confiding in the honesty of those with whom they have dealings, think proper, in order to save themselves trouble, to expose themselves to a like risk.

Evidence was gone into at the trial of what was called the "practice" in the tobacco trade of following the course pursued in the present instance by the plaintiff, namely, that of leaving, on the purchase of tobacco in bond, the tobacco and the dock warrants in the hands of the seller—whether, with the view of meeting the allegation of negligence, or as a substantive answer

(1) Law Rep. 10 Ex. 337.

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in point of law to the defendant's claim, as amounting to a usage of trade, it may be difficult to say. If the former, I have given the answer which occurs to me, namely, that that which would be negligence in one does not become the less so because others are equally negligent. If the latter, two answers present themselves. First, a practice, to amount to a usage of trade, must be general and uniform. But of this the evidence falls altogether short. The plaintiff's witnesses, called to prove the practice, while they asserted that the practice was common, fully admitted that there were many houses in the trade who, when they bought tobacco under similar circumstances, insisted on having the indicia of title made over to them. Nor did these witnesses for a moment deny that a purchaser was entitled to have such a demand complied with. This being so, any assertion of usage of trade necessarily fails.

But, besides this, a usage of trade, like any other custom, to be valid must be reasonable. But a usage cannot be said to be reasonable which enables a dishonest vendor, through the negligence of his vendee, to defraud a second purchaser, or a pledgee, by a pretended sale or pledge.

But whether this negligence of the plaintiff will under the circumstances give to the defendants any ground of complaint which can be enforced in point of law is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is in my opinion, correctly stated by Blackburn, J., in *Swan* v. *North British Australian Company* (1) where, after referring to what was said by Parke, B., in *Freeman* v. *Cooke* (2), namely, that "negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it," he goes on to say: "This I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except

(1) 2 H. & C. 175, at p. 181; 32 L. J. (Ex.) 273, at p. 276.
(2) 2 Ex. 654; 18 L. J. (Ex.) 114.

in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognise—either as individuals or as members of the general public.

The case of *Young* v. *Grote* (1) is, as was pointed out in the case just referred to, plainly distinguishable. For, there, there was a duty on the part of the customer to use due care in drawing the cheque, so as to protect the banker against the risk of forgery in the amount for which the cheque was drawn.

This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counter-claim for the money which they have advanced to Hoffmann on the security of the goods.

I am therefore of opinion that the judgment of Mr. Justice Denman in the case of *Johnson* v. *Credit Lyonnais Company* (2) should be affirmed.

With regard to the judgment of Mr. Justice Field in *Johnson* v. *Blumenthal*, I feel bound to say that the question put to the jury, as I understand at the instance of counsel, and the answer given to it do not appear to me to be conclusive of the case or sufficient to found the judgment; and, if there were any material fact in dispute, I should think it necessary to send the case back to a new trial. But as, upon the admitted facts, the plaintiff is, for the reasons I have given, in my opinion, entitled to judgment, a new trial would be useless and unnecessary. In this action also, therefore, I think, that the appeal should be dismissed and the judgment affirmed.

BRAMWELL, L.J. In these cases I agree in the judgment of my Lord Chief Justice, and my Brother Brett, but I propose to add some remarks of my own, for this reason: It has been laid down that the "intrusting" under the Factors Act must be "to a factor

(1) 4 Bing. 253. (2) 2 C. P. D. 224.

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or agent as such;" but the language of the statutes has not, as it seems to me, been critically examined to shew that that is the meaning till Mr. Thesiger did so in these cases. The following observations are for the same purpose. On examination it will be found that the defence on those Acts in these cases turns on s. 2 of 6 Geo. 4, c. 94. For 5 & 6 Vict. c. 39, s. 1, so far as these cases are concerned, only repeals the proviso in s. 2 of 6 Geo. 4, c. 94, as to the pledgee not having notice. But to understand this 2nd section of 6 Geo. 4, c. 94, and shew that it alone could apply to these cases, it is necessary to examine several of the clauses of the statutes called Factors Acts. The first section of the first of these Acts, 4 Geo. 4, c. 83, enacts that any person intrusted for the purpose of sale with any goods and by whom they shall be shipped, or when shipped in his name by any other person, shall be deemed to be the true owner, so far as to entitle the consignee to a lien thereon for advances. It is manifest that this only applies to cases where the person in whose name the goods are shipped, is intrusted with them for the purpose of sale: and it only applies to advances by consignees to the person in whose name goods are shipped. The 2nd section says that any person may make advances on goods or bills of lading to consignees thereof, but only to the extent of the interest of the consignee. This section then would enable a consignee who had a lien for advances by the common law, or by the 1st section, to give a right to the same extent to another. But as far as the statute is concerned, it only confers a title to a consignee where goods are intrusted to a person for sale and shipped in his name.

The next Act is the 6 Geo. 4, c. 94. By sect. 1, "any person intrusted for the purpose of consignment or of sale with goods which he has shipped in his own name, is to be deemed the true owner, with the same powers as in the former statute." Here also there must be an intrusting for sale or consignment. But the section contains a further provision with language different from the first Act, "any person in whose name goods shall be shipped by any other person shall be deemed," &c. This does not say in words any person intrusted for sale or consignment, but it must mean so. Because it is impossible to suppose that there was to be a difference between a case where goods are shipped by A. in his

own name, and one where goods are shipped in A.'s name by B. It is also obvious that if taken literally stolen goods might be shipped in somebody's name by the thief, so as to give that person a right in respect of advances. But the matter is concluded by the last proviso in that section, which supposes that it only applies where goods are intrusted for the purposes of consignment or sale. The only difference then between this section and 4 Geo. 4, c. 83, is that the latter Act includes the case of goods intrusted for consignment in addition to that of goods intrusted for sale. The 2nd section of 6 Geo. 4, c. 94, is that on which this case depends, as far as the Factors Acts are concerned; it has a more extensive operation than the previous provisions, which only apply to consignees under shipments; but this section applies to all cases where persons are intrusted with, and in possession of, bills of lading, warrants, certificates, or orders for the delivery of goods, which suppose a right to the possession of goods. It does not mention "goods" themselves. It provides that it shall not apply, where by the document or otherwise, there is notice that the person intrusted is not the true owner of the goods. So that possession by A. of a bill of lading to the order of B., would not be within the section. It says that the person intrusted shall be deemed the true owner of the goods, so as to give validity to contracts for sale or disposition or deposit or pledge thereof. It does not say "factor" or "agent" intrusted, but "person." What is the "intrusting," and who is the "person" within this section? Must the intrusting be to a "person" who is factor or agent, and to him to act as such factor or agent, or does it apply wherever possession of the document is given to another by the person entitled? Arguments can be found to shew it does. I believe the documents specified in the statute always mention the name of the person entitled, so that if the true owner has indorsed the document, or allowed it to be made out in another's name, there is ground for saying that he is by his own act no longer the true or apparent owner of the goods, or has given the power or apparent power of disposing of these goods to the holder of the warrant. The following considerations, however, seem to me conclusive the other way. As I said before, "goods" are not mentioned. In the 3rd section,

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however, goods only are, and not bills of lading and other documents. It does seem impossible to suppose it was meant that intrusting a clerk or other person with bare possession of a bill of lading should enable that person to dispose of the goods mentioned in it, and that intrusting with possession of a document of title would have greater effect than intrusting with goods. Further, by 6 Geo. 4, c. 94, s. 1, consignees can pledge bills of lading, but only where intrusted therewith for sale or consignment. It cannot be, then, that s. 2 means that any person intrusted with the possession merely can pledge them. Further, by s. 4 persons may buy goods of known agents intrusted therewith and pay them in the ordinary course of business, and without notice of want of authority. This would also seem to be the law independently of statute. But the "person" who can pledge must surely be a person of the same character as the one who can sell, viz., an agent. Sect. 5 says that it shall be lawful to accept and take goods, or "any such document as aforesaid," in deposit or pledge from any such factor or agent, though known to be such, but so as to get no greater right than could have been enforced by such factor or agent. In this section "factor" is mentioned for the first time; "agent" occurred in the preceding section. It goes further than s. 2 of the former Act, in the following particulars: it is not limited to consignment and bills of lading, nor to cases where there is no notice that the pledgor is an agent. What is the meaning of "such factor" or "agent," factor not being previously named? Section 2 of 4 Geo. 4, c. 83, is unrepealed. It cannot be that the consignee must be intrusted for sale, but the factor need not be. It seems to follow, then, that such factor or agent as is mentioned in s. 5 of 6 Geo. 4, c. 94, is the factor or agent intrusted for consignment or sale. This is confirmed of s. 6, which says that the true owner may recover his goods from his factor or agent before the same are sold or pledged. This supposes that "person intrusted" in s. 2 means as factor or agent and agent in the nature of factor. Again, s. 7 recites it is expedient to prevent the improper deposit or pledge of goods intrusted or consigned as aforesaid to factors or agents, and then enacts that if any such factor or agent shall deposit or pledge any goods intrusted or consigned as aforesaid to

his care or management, or any of the documents so possessed or intrusted as aforesaid in violation of good faith, he shall be guilty of a misdemeanour; and in the next sections "principals" are spoken of. Further, the preamble of 5 & 6 Vict. c. 39, supposes that the intrusting is to an agent, and that pledges are only to be valid where sales would be; and it enacts, any agent who shall be intrusted with the possession of goods or of documents of title to goods shall be deemed to be the owner so far as to give validity to pledges, &c., bonâ fide made; though the pledgees had notice that the pledgor was only an agent. This, in effect, repeals the qualification in the former Act as to notice, and shews conclusively that the "intrusting" in 6 Geo. 4, c. 94, s. 2, must be to a person who is an agent, and necessarily therefore an intrusting to him as such, because, and it is absurd to suppose that the intrusting must be to a factor or agent, but need not be to him as such. The consequences would be that a sugar warrant left for safe custody with a tobacco broker might be pledged by him, though he could not sell it. In the result it seems to me that the combined effect of the first two statutes is by s. 1 of 4 Geo. 4 c. 83, and s. 1 of 6 Geo. 4, c. 94, persons in whose names goods are shipped who are intrusted therewith for sale or consignment shall be deemed to be the true owners, so as to entitle consignees without notice to a lien for advances.

By the second sections of both Acts the consignees of goods may pledge them or the bills of lading thereof, and factors or agents in the nature of factors intrusted with bills of lading and warrants to deal with them as factors may make valid contracts of sale or pledge as to them to persons not having notice; when there is notice then the contract of sale is only valid to the extent of the pledgor's interest. Unless "person intrusted," in s. 2 of 6 Geo. 4, c. 94, means factor or agent intrusted as such, that section will differ in that particular from all the others of all three statutes. It will appear from this that Lord Tenterden, as quoted in Law Rep. 10 C. P. 361, is not quite accurate. He says "the person in whose name the goods are shipped is to be deemed the true owner thereof." He should have added, "where intrusted therewith for sale or consignment." There are other provisions in these Acts not necessary to be mentioned further. The cases before us turn on

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their provisions, and not on those of 5 & 6 Vict. c. 39, which is only important in these cases as shewing the meaning of the former Acts. Section 6 may be referred to. It makes it a misdemeanour for an agent "intrusted as aforesaid," for his own benefit and in violation of good faith to make any deposit, &c., of such goods or documents "contrary to or without such authority." In the present case there was no intrusting to Hoffmann as an agent, nor indeed at all. I have not forgotten that by s. 4 of 5 & 6 Vict. c. 39, an agent intrusted as aforesaid and possessed of such documents of title, obtained by reason of such agent having been intrusted with the possession of goods, shall be deemed to be intrusted with the possession of the goods, and that he shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or be held by another subject to his control. But in those cases there is an intrusting as agent. Here there was nothing of the sort. The plaintiff, the vendee from Hoffmann, left the goods in the control of Hoffmann because they stood in Hoffman's name. But he left them there, not that Hoffmann should deal with them as his or as a factor or agent, but that he might forward them to him or his order, in pursuance of the practice that existed in dealings between them, and which therefore was part of the contract between them of vendor and purchaser. The case might be treated thus: Suppose Hoffman was indicted under s. 7 of 6 Geo. 4, c. 94, would it be possible to make out that he was "such factor or agent" as there mentioned? I am of opinion, therefore, that these cases are not within the Factors Acts; that the question turns on s. 2 of 6 Geo. 4, c. 94; that the "person intrusted" there means "factor or agent intrusted as such;" but Hoffman was not intrusted by the plaintiff as his factor or agent. The 40 & 41 Vict. c. 39 is not retrospective, otherwise the case would be within s. 3 of that statute if the continued possession of goods by a vendor is within it. One may observe that it shews what words would, and consequently what do not, include the present case.

I need say nothing on the other point except that I agree with the Lord Chief Justice and my Brother Brett.

BRETT, L.J. The first of these cases was tried before Denman, J.,

without a jury, the second before Field, J., and a special jury. In the second case the only question proposed on behalf of the defendant for the consideration of the jury, and the only question left to them was, "Whether the plaintiff did give to Hoffmann authority or ostensible authority to deal with the goods as owner, or as agent with authority to pledge?" The jury answered, "Certainly not." It was admitted that Hoffmann was originally the owner of the tobacco; that he had sold it to the plaintiff so as to pass the property in it to the plaintiff; that the tobacco was only left in bond in Hoffman's name, in order to avoid payment by the plaintiff of duty until the tobacco should be forwarded to him by Hoffmann on request as the plaintiff might require it. It was admitted that this was an ordinary practice in the tobacco import trade. It was expressly admitted that there was no negligence on the part of the plaintiff in leaving the goods in bond and in Hoffmann's name. It was admitted on behalf of the plaintiff that Hoffmann, besides being an importer and seller of tobacco on his own account, did carry on the business of a tobacco broker or factor. Upon this last admission it was submitted to the learned judge that, notwithstanding the finding of the jury, the defendant was entitled to judgment. The proposition submitted was, that the defendant was entitled to judgment, because the goods were intentionally left by the plaintiff in the apparent possession and control of a man whose business, or a branch of whose business, it was to sell that sort of goods. Whether this was alleged to be by virtue of the Factors Acts, or as conclusive evidence in favour of the defendant of the proposition which was submitted to the jury is not clear. In either view the learned judge gave judgment for the plaintiff.

In the first case Denman, J., determined the same question of law in the same way, and found on the questions of fact that the plaintiff only left the possession and control of the documents representing the tobacco in the power of Hoffman, as his agent for the purpose of forwarding the tobacco to him or to his order; that Hoffmann was a mere vendor to the plaintiff, who was, in accordance with the practice of the trade, left in possession of the goods in bond so as to avoid premature payment of duty, undertaking to clear and forward the goods for the plaintiff as required;

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that under such circumstances Hoffmann was not in law or in fact intrusted by the plaintiff as an agent quâ sale or pledge or dealing of any kind of or in the goods.

The learned judge held, as matter of law, upon such findings of facts, that neither the 9th or 10th paragraphs (1) of the defendant's statement of defence was proved.

There was no allegation, it will be observed, in either of those paragraphs or in any other part of the statement of defence that the plaintiff had been guilty of negligence.

It seems to me that the evidence in the two cases was substantially to the same effect, and that the findings of fact and rulings of law are substantially the same.

It follows that the questions are:

(1.) Can the findings of fact, which in neither case include a finding of negligence on the part of the plaintiff, be set aside as unsatisfactory;

(2.) If not, are the transactions of the defendants respectively protected by the Factors Acts;

(3.) Or, in consequence of the plaintiff's conduct, though he was not guilty of negligence;

(4.) Or was there evidence of negligence on the part of the plaintiff so strong as to oblige the Court to send the second case to a new trial on the same or other pleadings, and to enter judgment for the defendants in the first case as upon a re-hearing?

Omitting for the present the question of negligence on the part of the plaintiff, I think that the answer of the jury in the second case, and the findings of fact by the learned judge in the first case, cannot be set aside by us. It follows that Hoffman was not intrusted by the plaintiff with the possession either of the goods or of the documents of title as an agent for sale or pledge, or in order to carry out any part of a contract of sale or pledge; but, if intrusted as an agent at all, only at the utmost as an agent to hold the goods in custody, and the documents for the purpose of clearing the goods and forwarding them to the plaintiff or his order, on request. Under such a state of facts, I am of opinion that the cases of *Fuentes* v. *Montis* (2), and *Cole* v. *North Western Bank* (3),

(1) See 2 C. P. D. at p. 227.

(2) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.

(3) Law Rep. 9 C. P. 470; Law Rep. 10 C. P. 354.

are conclusive authorities on the construction of the Factors Acts, and that the transactions of the defendants are not protected by the Factors Acts. If the plaintiff was guilty of no negligence and did not give either authority or ostensible authority to Hoffmann to pledge the tobacco, the defendants cannot, I think, be protected by any principle of law independent of the statutes. There is nothing done by the plaintiff to estop him from maintaining against the defendants his rights of ownership.

The only question remaining is that as to the alleged negligence of the plaintiff, and the consequences of such negligence if it should exist. The negligence suggested is the omission to have the tobacco transferred into his own name at the dock bonded warehouse, or to have the dock warrants or delivery orders transferred to him by Hoffmann. But in the face of the finding of a mercantile jury in one of the present cases, and the admission in both that what the plaintiff did was what so many mercantile men have, up to this time habitually done, that to do otherwise was an exception, I feel that we ought not to hold that in the present cases the plaintiff was guilty of negligence, and therefore that we have not to consider what the consequences of such negligence might be. I am of opinion that both judgments should be affirmed with costs.

Judgments affirmed. (1)

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for Barley & Read, Bolton.*

Solicitors for Credit Lyonnais Company: *Michael Abrahams & Roffey.*

Solicitors for Blumenthal: *Munton & Morris.*

(1) See now 40 & 41 Vict. c. 39.

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Construction of Agreement—Covenant or Stipulation—Public-House Lease.

By a contract for the sale of a public-house, the vendor agreed to assign and the purchaser agreed to take the lease, "subject to the yearly rent of 90*l.* and the performance of the *covenants* thereby reserved and contained, such covenants being common and usual in leases of public-houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause:—"Provided always and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground-landlord within two months of its date, for the purpose of registration, and a fee of one guinea paid for such registration," and a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to."

The purchaser refused to complete, on the ground that this was not a common and usual covenant; and the jury so found:—

Held, that, whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, and therefore the purchaser was not bound to complete.

THE plaintiff became the purchaser of a public-house under the following agreement:—

An agreement made and entered into this 13th day of June, 1876, between A. J. Drysdale, of, &c., hereinafter called the vendor, of the one part, and H. J. Brookes, of, &c., hereinafter called the purchaser, of the other part:

The said vendor, for and in consideration of 200*l.* to him now paid by the purchaser by way of deposit, and of the further sum of 4500*l.* to be paid to the vendor at the time hereinafter mentioned, doth hereby, for himself, his heirs, &c., agree with the purchaser, his executors, &c., to furnish and adduce a proper title, subject as hereinafter mentioned, and well and effectually to assign to him or them, or to such person or persons as he or they may appoint, a lease of all that public-house and premises known by the sign of the Grafton Arms, situate in Grafton Street, Mile End, &c., for the remainder of a term now to come and unexpired therein, which is seventy-three years at least from Midsummer, 1876, subject to the yearly rent of 90*l.* and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses, and to deliver up quiet possession of the aforesaid house and premises (except that part which is underlet) to the purchaser, his executors, &c., or to such person or persons as he or they may appoint, on or before the 3rd of July, 1876, and to clear up all rents, taxes, gas-light rent, and all incumbrances whatsoever up to the time of taking possession; also to make a good and proper assignment of the licences at the time above mentioned or as soon thereafter as may be, on being paid for the time unexpired therein, and for that purpose to attend at the transfer and do all acts necessary for vesting the same in the purchaser, his executors, &c., or such person or persons as he or they may

appoint: And the purchaser, for himself, his executors, &c., doth hereby agree with the vendor to accept such assignment of the lease aforesaid without requiring the production of the lessor's title, or any evidence of title prior to the lease under which the present vendor holds the premises, notwithstanding any superior or other title or evidence of title may be recited, stated, or referred to or covenanted to be produced, and shall make no objection should the lease be an underlease or the premises demised form part of larger property demised by any superior or other lease, or that the premises may be subject to any superior rent; and shall enter upon and take possession of the premises on the 3rd of July next, and thereupon pay to the vendor 4500*l.*, being the remainder of the purchase-money for the said lease and goodwill; also to purchase at a fair appraisement the furniture, stock, &c. And it is hereby further agreed that, if either party shall refuse or neglect to perform his part of this agreement, he shall pay to the other 500*l.* as ascertained damages; and, in case of default on the part of the purchaser, the deposit money shall be forfeited in part of such damages. In witness, &c.

The abstract was delivered on the 20th of June; and, on the plaintiff's solicitors comparing the lease with the abstract, they discovered that the lease contained the following stipulation or condition:—

Provided always and these presents are upon this express condition, that all and every underlease or underleases, deed and deeds of assignments or disposition of the premises whatsoever, and evidence of all devolutions of the same by will or act of law, which shall at any time or times during the said term hereby granted be made or executed or occur, shall be left with the solicitor for the time being of the superior or ground landlord or landlords for the time being within two calendar months from the date of such assignment, underlease, or deed of disposition or devolution as aforesaid, for the purpose of registration by him, and a fee of one guinea paid to him for such registration: Provided also, and these presents are upon this condition, that, if the said yearly rent hereby reserved shall be unpaid by the space of twenty-one days after any of the days hereinbefore appointed for the payment thereof, or in case of breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to, and by the said lessee, his executors, administrators, or assigns to be observed and performed, then it shall be lawful to and for the said lessor at any time thereafter upon the said demised premises to re-enter and the same to have again and retain as in his and their former estate.

The plaintiff thereupon declined to complete the purchase, on the ground that this was not a "common and usual covenant," and brought this action to recover back the deposit.

At the trial before Field, J., at the last Easter Sittings, it was contended on behalf of the defendant that the proviso in question was not a *covenant*, but merely a stipulation or condition; and that it was a common and usual stipulation in leases of public-houses.

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The learned judge ruled that it was a covenant, and the jury found that it was not a common and usual one, and returned a verdict for the plaintiff for 200*l.*, to be reduced to 100*l.* upon delivery up of the I. O. U. which had been given for a moiety of the deposit.

A rule nisi having been obtained for a new trial on the ground of misdirection,

Grantham, Q.C., and *C. H. Robarts*, shewed cause. In Sheppard's Touchstone, p. 162, it is said: "There needs not formal and orderly words, as, covenant, promise, and the like, to make a covenant on which to ground an action of covenant, for, a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down for anything to be or not to be done, the party to or with whom the promise or agreement is made may have this action upon the breach of the agreement. And therefore, if these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." In Com. Dig. *Covenant* (A. 2), it is said: "Any words in a deed which shew an agreement to do a thing make a covenant: as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo proinde the interest to A., covenant lies against B. for the interest:" Rol. Abr. 518, l. 50. So, in Com. Dig. *Covenant* (A. 2), it is said: "If the words are introduced by words of condition, as, if a lease be upon condition that the lessee shall keep and leave the house in as good plight, &c. (1); or with proviso that, if the lessee dies within forty years, his executor shall have it for so many years, this is a covenant by the lessor that the executor shall have it:" Rol. Abr. 518, l. 45. *Treloar* v. *Biggs* (2) shews that a proviso or stipulation may be construed as a covenant if the nature of the case requires it. In *Hayne* v. *Cummings* (3) it was held that the words "covenant" and "condition," whenever used in an *agreement*, do not necessarily

(1) Year Book, 40 Edw. 3, fo. 5. b. (2) Law Rep. 9 Ex. 151.
(3) 16 C. B. (N.S.) 421.

mean a covenant under seal or a condition in the strict legal sense of the word; but may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation." Willes, J., refers to the several definitions of "covenant" given in Richardson, in Johnson, and in Webster; and at p. 427 he says: "To say that the word *covenants* here cannot apply to the stipulation contained in this agreement is to say that the word cannot have any sense at all. But we are bound so to construe the instrument as to give, if possible, effect to every word contained in it. Neither does the word *condition* necessarily apply to a condition under seal." Referring to the expressions of Lord Hobart, in *Earl of Clanrickard's Case* (1), Byles, J., at p. 428, says: "We are to be astute, if necessary, to put such a construction upon the words 'covenants' and 'conditions' as will best give effect to and carry out the intention of the parties to this agreement." There may, no doubt, be provisos or stipulations which are not covenants; for instance, a proviso for re-entry. Here, the word "covenant," to give it any sensible meaning at all, must be construed in its widest and most comprehensive sense. The words of the clause are clearly words of obligation: the true meaning is, that there shall be nothing in the lease which binds the purchaser to anything which is unusual in such leases.

A. L. Smith, in support of the rule. This is not a covenant. In *Geery* v. *Reason* (2), it was held that the words "provided and it is agreed, &c.," make not a *covenant*, but only a condition so as to work a forfeiture if the thing agreed to be done is not done. *Suffield* v. *Baskervil* (3) is to the same effect. In a note in Bac. Abr. *Covenant* (A.), vol. ii, p. 340, it is said: "A proviso shall be sometimes taken for a *condition*, and sometimes for *explanation*, and sometimes for a *covenant*, and sometimes for an *exception*, and sometimes for a *reservation*. It is taken for a *condition*, as, if a man lease land, *provided* that the lessee shall not alien without the assent of the lessor, sub pœna foris facturæ; here it is a *condition*. If I have two manors both of them called Dale, and I lease to you my manor of Dale, *provided* that you shall have my manor of Dale in the occupation of J. S.; here the proviso is an *explana-*

(1) Hob. 277. (2) Cro. Car. 128.
(3) 2 Mod. 36.

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tion what manor you shall have. If a man lease a house, and the lessee covenant that he will maintain it, *provided* always that the lessor is contented to find great timber; here it is a *covenant.* If I lease to you my messuage in Dale, *provided* that I will have a chamber myself; here it is an *exception* of the chamber. And, if I make a lease rendering rent at such feasts as J. S. shall name, *provided* that the feast of St. Michael shall be one; here this proviso is taken for a *reservation,*—per Popham, C.J., in *Earl of Pembroke* v. *Barkley.* (1) It may sometimes operate as a qualification of the covenant of the other party; as, if a lessee covenant to repair, *provided always that the lessor shall find great timber,* omitting the word *agreed;* this proviso shall not be any covenant on the part of the lessor, but shall be merely a qualification of the lessee's covenant: Rol. Abr. *Covenant* (C), pl. 3, *Holder* v. *Taylor.* The very clause, too, of the proviso itself may operate both as a condition and as a covenant; as a condition, by force of the proviso; as a covenant by force of the other words: purporting a condition, as it contains the words of the grantor (for, no condition can be reserved or made but on the part of the donor, lessor, or feoffor,—Dyer, 6); purporting a covenant, as comprehending the words of the grantee. Nor is it material in what part of the deed the word *proviso* stands; it is the sense and not the place which is to determine its import. If it be substantive and independent, and relate only to the estate passed, it is a condition; if it be qualified, it may amount to a covenant only: if there be a proviso and covenant in the deed, it may enure to both: Jenk. 252; *Cromwel's Case* (2); *Simpson* v. *Titterell* (3); *Earl of Pembroke* v. *Berkley* (4); Co. Litt. 203 b.; 146." This proviso lies between the lessor's covenants and those of the lessee; and in the subsequent part it is referred to as a "stipulation." The only words which can be suggested to be otherwise than common and usual in leases of public-houses, are the words which relate to devolutions "by act of law." This is a stipulation by the vendor, not that he will do anything to the purchaser, but to a third person. Assuming the lease to have been executed, could the lessor have sued the lessee for damages for

(1) Gouldsb. 131; Cro. Eliz. 384.
(2) 2 Rep. 71.
(3) Cro. Eliz. 242.
(4) Cro. Eliz. 384; Gouldsb. 130.

not leaving the indenture of assignment or other evidence of devolution of title with the solicitor of the ground-landlord for registration? Clearly not. The words of the agreement are distinct and unequivocal. The decision in *Hayne* v. *Cummings* (1) proceeded on the ground that upon any other construction there was nothing to which the word "covenant" in the agreement could apply.

GROVE, J. I am of opinion that this rule should be discharged. Two questions arise in this case,—first, whether the stipulation in the head lease that every underlease or deed of assignment of the premises, and evidence of all devolutions of the same by will or act of law, which shall during the term be made or occur, shall be left with the solicitor of the ground-landlord for registration, amounts to a covenant, or is merely a stipulation in the nature of a proviso for re-entry, so as to make a breach thereof work a forfeiture,—secondly, whether the word "covenant" in the contract of sale in this case is to be tied down strictly to what was a covenant by the old law, or whether it was not intended by the parties to mean and include any stipulation or condition which might affect the lessee, of a nature and character which is other than is common and usual in public-house leases. Upon both points my judgment is in favor of the plaintiff.

Upon the first point, I am of opinion, upon the authorities cited, and upon the reason of the thing, that, though the words "covenant" and "agree" are not used, there is enough to make this proviso or stipulation a covenant in law. "Any words in a deed which shew an agreement to do a thing make a covenant: as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo proinde the interest to A., covenant lies against B. for the interest:" Com. Dig. *Covenant* (A. 1.) Again, "If the words are introduced by words of condition, as, if a lease be upon condition that the lessee shall keep and leave the house in as good plight, &c.; or with proviso that, if the lessee dies within forty years, his executor shall have it for so many years, this is a covenant by the lessor that the executor shall have it:" Com. Dig. *Covenant* (A. 2.).

(1) 16 C. B. (N.S.) 421.

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The cases of *Geery* v. *Reason* (1) and *Suffield* v. *Baskervil* (2), cited by Mr. Smith, look rather the other way: but there the Court considered that, taking the whole deed, the words were inserted, not by way of covenant, but merely as a condition or stipulation so as to work a forfeiture if not complied with. So, in Sheppard's Touchstone, p. 162, it is laid down that "there needs not formal and orderly words, as, covenant, promise, and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words:" and the following instance is put: "If these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." There, neither the word "covenant" nor the word "agreed" is used. It seems to me that, although there may be some slight apparent contradiction in some of the authorities, these may well be reconciled by looking at the whole of the instrument in order to ascertain the real intention of the parties. Looking at the words of the clause in question,—which are much the same as in the passage cited from Sheppard's Touchstone,—I do not see why it should not be held to be a covenant as much as the stipulations which precede it. It uses imperative words. Some reliance was placed upon the language of the proviso for re-entry in the lease,—"in case of breach or non-performance of any of the covenants *or other stipulations* hereinbefore contained or referred to," it shall be lawful for the lessor to re-enter; and it was said that if the proviso as to registration of deeds of assignment was not construed to be a "stipulation," there was nothing to which those words could apply. If the language had been conjunctive instead of disjunctive, there might have been more plausibility in that argument. But I take it that the real meaning of the proviso is, that, in case of breach of any of the engagements entered into by the lessee, the lease shall be forfeited, and the lessor may re-enter. General words like these do not affect the question what shall be a covenant and what a mere stipulation. I am of opinion that, consistently with all the authorities, the words in question are

(1) Cro. Car. 128. (2) 2 Mod. 36.

sufficient to create a covenant. But, assuming that I came to the conclusion that this was not a covenant upon which an action of covenant could have been maintained, it does not follow that the words used in this agreement are not sufficient to shew that the parties contemplated its being binding on them as a covenant. The purchaser agrees to take the remainder of the lease, "subject to the yearly rent of 90*l.* and to the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses." What was the manifest intention of the parties to the contract? Was it not that the purchaser should make himself subject to all the obligations to which the vendor himself was subject, provided that they were such as were common and usual in public-house leases? I think the word "covenant" in this agreement was not used in its strict sense: and, the jury having found that this was not a covenant that is common and usual in such leases, I think the plaintiff is entitled to retain his verdict.

LINDLEY, J. I am of the same opinion. The question for us is, what is the true construction of this agreement. It is in print, and it is divided into two parts,—in the first part, the vendor agrees to sell and assign, and in the second part the purchaser agrees to accept an assignment of the lease. The clause which we have to construe is found in the first part. Now, the rule is, that, in construing a written instrument, you are bound to give it the interpretation which is the least favorable for the party whose language it is. But I do not think we are driven to that here. The vendor agrees to assign the lease "subject to the yearly rent of 90*l.* and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses." What is the object of that? It is to inform the buyer what are the conditions and obligations which he binds himself to enter into: the parties are not discussing how to classify them. The buyer is to have the lease subject to the payment of the stipulated rent, and he is to take upon himself the performance of all such covenants as are usual and common in leases of public-houses. In what sense is the word "covenant" here used? The real meaning is that it shall include all the

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burthens the purchaser is about to undertake, whether in the form of a condition, a proviso, or a stipulation. If so, the case set up by the defendant is answered. The jury have found that the proviso in question is not a covenant which is common and usual in leases of this kind. If it were necessary to go into the question, I am disposed to think that the proviso or stipulation in question might well be construed to be a covenant. But I prefer to rest my judgment on the ground that it is clearly a covenant within the meaning of the parties to this agreement.

Rule discharged, with costs.

Solicitors for plaintiff: *Martineau & Reid.*
Solicitors for defendant: *Shum, Crossman, & Crossman.*

Dec. 17.

YGLESIAS *v.* THE MERCANTILE BANK OF THE RIVER PLATE.

Bill of Exchange—Effect of Cancellation, as between Payee and Acceptor, without full Payment.

The plaintiff obtained from the defendants an advance of 15,000*l.* upon the security of goods then in transit to Monte Video consigned to one S., and of six bills of exchange drawn by the plaintiff upon and accepted by S. against the shipments. Two of these bills were duly paid: but, other two having been dishonored, the defendants (at Monte Video) proposed to realise the goods at once, whereupon the plaintiff handed them a cheque for 2500*l.*, accompanied by a letter requesting them not to sell, and authorizing them to hold the 2500*l.* as collateral security for S.'s acceptances, to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonored by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold, and the bills were delivered up to S. cancelled without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the 2500*l.*, to pay all the bills.

In an action by the plaintiff against the defendants to recover back the 2500*l.*:—

Held, that, notwithstanding the effect of the cancellation of the bills was to discharge both the plaintiff and S. from all liability *on the bills*, and also to deprive the plaintiff, as drawer, of all remedy upon them against S. as acceptor, the circumstances under which such cancellation took place was not equivalent to payment of the bills in full; and, consequently, that the plaintiff was not entitled to call upon the defendants to refund the 2500*l.*, or any part of it.

ACTION to recover 2500*l.* and interest from the 27th of April,

1874, under the circumstances stated in the following special case:—

1. The plaintiff is a merchant carrying on business in London under the style of J. R. Yglesias & Co., and the defendants are bankers there.

2. On the 25th of November, 1873, the defendants granted and delivered the following letter of credit to Messrs. J. R. Yglesias & Co.:—

6, Lombard Street, 25 Nov. 1873.

Mercantile Bank of the River Plate, Limited.

No. 13. £15,000 sterling.

Messrs. J. R. Yglesias & Co.

Dear Sirs,—We hereby authorize you to draw on us at 90 d/st to the extent of 15,000*l.* sterling against shipments of materials for tramways to Monte Video; said drafts to be accompanied by invoice and full set of bills of lading in our name, and draft at three months' date on Mr. F. P. Santayana for amount of invoice and your charges; insurance to be effected by us. This credit to be in force for six months from this date.

For the Mercantile Bank of the River Plate, Limited,

Ch. Raphael, Manager,

J. H. Duncan, Secretary.

3. The plaintiff acknowledged the receipt of this letter of credit by the following memorandum, which contains the terms upon which the letter of credit was granted,—

To the Mercantile Bank of the River Plate, Limited.

Gentlemen,—We have received from you a letter of credit, No. 13, in our favour, for 15,000*l.* sterling.

The drafts against this letter of credit will be drawn at 90 days' sight. Our drafts under this letter of credit will be accompanied by our drafts at three months' date on Mr. F. Santayana, of Monte Video, for amount of invoice and our charges; and, in the event of non-payment of such drafts, we authorize you to realise the goods represented by the documents attached, and hold ourselves responsible for any deficiency that may arise, subject of course to your communicating with us before you take this extreme course.

We engage to pay you 1½ per cent. commission, interest for four months at 5 per cent. per annum (and, if the Bank of England rate be higher, this latter rate), and 1 per cent. for postage and petties. We authorize you to effect the insurance at the current rate, and engage to reimburse you here the amount of premiums.

The goods shipped under this credit being insured with first-class underwriters, we shall not make the bank responsible for any question or claim that may arise in respect of the insurance or damage, nor for any greater claim than the sum recovered from the underwriters. At the same time, the bank will use its best endeavours to obtain payment of whatever claim may be made, upon receipt of the necessary documents, without charging any other commission.

(Signed) J. R. Yglesias & Co.

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4. The plaintiff accordingly drew drafts upon the defendants, and handed to the defendants the documents in the letter of credit mentioned; and the drafts were accepted by the defendants and were in due course paid by them. Mr. F. P. Santayana mentioned in the plaintiff's letter of the 25th of November, 1873, was the person on whose behalf the materials were shipped by the plaintiff, and was the person liable to provide for the drafts drawn upon him by the plaintiff and handed to the defendants.

5. Two of the drafts drawn by the plaintiff upon Santayana were duly paid by him at maturity, and the documents representing the goods for which such two bills were accepted were thereupon handed by the defendants to him. The remainder of the drafts were dishonored by him on presentation.

6. Upon the fact of such dishonor becoming known to the defendants, they wrote and sent the following letter to the plaintiff:—

Messrs. J. R. Yglesias & Co. London, April 27th, 1874.

Dear Sirs,—In reference to our conversation with your representative to-day, and in consequence of your drafts on Mr. Santayana having now twice been dishonored, we beg to communicate to you that it is our intention, in the case of your draft for 1020*l.* 17*s.* already advised as unpaid, and of all the other remaining bills in case of their being also dishonored, to realise the goods at once, unless other provision is previously made for the bills. We shall be glad to be favored with your reply (should you have anything to communicate) this afternoon before 4.30, as we are telegraphing the instructions to-day.

Negotiations then took place between them as to what should be done; and on the same 27th of April, 1874, the plaintiff handed to the defendants a cheque for 2500*l.*, upon the terms mentioned in the following letter:—

To the Mercantile Bank of the River Plate, Limited.

Gentlemen,—In reply to your favor of this day's date, we beg to say that it would be very much against our interests if you were to telegraph to your branch at Monte Video to sell the tramway materials attached to our drafts on Mr. F. P. Santayana for 1020*l.* 17*s.* due 19th March, 2714*l.* 19*s.* due 30th March, 1704*l.* 10*s.* 3*d.* due 2nd instant, 1306*l.* 11*s.* 6*d.* due 8th instant, 1321*l.* 16*s.* 3*d.* due 20th instant, 4161*l.* due 6th May. And, to prevent this, we beg to hand you herewith, in compliance with your suggestion, a cheque for 2500*l.*, which please encash and hold the amount as collateral security for the above six bills on Mr. Santayana; but, when they are paid, with charges, you will of course refund us these 2500*l.*

We presume you will pay us interest on this amount. If not, we prefer invest-

ing it in Consols, and depositing the same with you until Mr. Santayana's bills are paid. We shall feel obliged by your kindly informing us on this head, and by your instructing your branch in Monte Video by next mail to understand with Messrs. Jose Firmat & Co., and to adopt conjointly with them, such measures for the settlement of this very unsatisfactory business as are likely to give us the least possible loss, or not any, if possible.

(Signed) J. R. Yglesias & Co.

7. The defendants acknowledged the receipt of the said letter and cheque by the following letter:—

Messrs. J. R. Yglesias & Co. London, April 28th, 1874.

Dear Sirs,—We beg to acknowledge receipt of your favor of yesterday inclosing cheque for 2500*l.*, being additional security for your outstanding drafts on M. Santayana. An account shewing the amount of interest due to you will be rendered hereafter.

8. The defendants encashed the cheque, and have retained the proceeds thereof to the present time.

9. According to the law of Uruguay, a creditor holding security cannot lawfully realise it except by means of a judicial sale under the order of the judge of the Tribunal of Commerce. The defendants commenced proceedings before the judge of the Tribunal of Commerce at Monte Video to obtain an order to realise their security by the judicial sale of the rails. Mr. Santayana appeared and opposed those proceedings, and the proceedings terminated in an arrangement entered into between the defendants, through Mr. Flowerdew, their manager at Monte Video, and Santayana.

10. This arrangement was entered into in an act of court, of which the following is a translation:—

To the commercial judge. We, Don Guillermo Flowerdew, manager of the Mercantile Bank of Rio de la Plata without revoking power, and Don F. P. Santayana, acting on his own behalf in the proceedings initialed in the name of the bank, praying authorization to effect the sale by public auction of a quantity of rails, iron tie-bars, and other materials, consigned to the bank and affected to the payment of sundry bills exhibited and protested unto your Honor in the most valid form,—shew that by common consent we terminate the said proceedings upon the basis following,—

(1.) The bank is at liberty freely to dispose of the effects consigned to the order thereof, and thereout or out of the proceeds thereof to pay to itself the bills protested, which are to be considered as cancelled, Santayana paying the costs and charges of the said proceedings:

(2.) Simultaneously with the act of effecting the payment of costs and charges, after taxation of the former and regulation of the fees of the advocate and attor-

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ney, the bills shall be delivered up to Santayana under a certificate passed before the registrar, and in the form of the disannexed minute appearing at fo. ——.

(3.) It is likewise agreed that, immediately on the statement of costs being made out, Santayana is to pay in the amount thereof, proceeding to distribute the same after delivery of the bills, in presence of the registrar, pursuant to what has been established on the preceding basis. For all necessary legal purposes consequent thereon, we pray your Honor to hold us as present, and, after ratification of the signatures as authentic proof of the truth of what has been agreed upon, to be pleased to order that the same be carried into due effect. Justice so requiring, &c.

(Signed by all requisite parties, and duly certified.)

11. In pursuance of this agreement the defendants, on payment of the costs by Santayana, gave up to him the whole of the bills mentioned in the letter of April 27th, 1874, as cancelled; and the defendants then took possession of the materials, and have disposed of the same as they pleased, without reference to the plaintiff or to Santayana or any other person.

12. The plaintiff afterwards received the cancelled bills from Messrs. Theule, Santayana, & Co., of Havre.

13, 14. Copies of the bills were set out in a schedule, which, with certain correspondence, were to be referred to, if necessary.

15. Messrs. Jose Firmat & Co. were a firm carrying on business in Buenos Ayres. The plaintiff was a partner in that firm, but resided and carried on business in London.

16. The interest on the 2500*l.* to the date of the writ amounts to 275*l.* 8*s.*

The question for the opinion of the Court was, whether under the circumstances stated the defendants were entitled to retain the 2500*l.*

The case was argued on the 3rd and 5th of December, 1877, by

Benjamin, Q.C. (*Petherham* with him), for the plaintiff, and

Cohen, Q.C. (*Edwyn Jones* with him), for the defendants.

The course of the argument will sufficiently appear by the judgment.

Cur. adv. vult.

Dec. 17. The judgment of the Court (Grove and Lindley, JJ.,) was delivered by

LINDLEY, J. The plaintiff in this action seeks to recover from the defendants a sum of 2500*l.* placed by him in their hands as

collateral security for the payment of certain overdue and dishonoured bills of exchange. These bills were drawn by the plaintiff on and accepted by a Mr. Santayana, and were held by the defendants; and, after the 2500*l.* had been given as collateral security, an arrangement was made between Santayana and the defendants by virtue of which the bills were cancelled and were given up to him by the defendants. The plaintiff was not a party to this arrangement; and he contends that, although the bills have not been paid in fact, yet, as they have been cancelled, they must be treated as having been paid, and that consequently he is entitled to have back his 2500*l.*

Now, the effect of the cancellation of the bills was undoubtedly to discharge both the plaintiff and Santayana from all liability on the bills themselves, and, further, to deprive the plaintiff, as drawer, of all remedy on the bills against Santayana, as acceptor.

Further, by cancelling the bills, the defendants must be treated as having received what but for such cancellation they might have recovered from the acceptor; so that, if he had been solvent, the defendants could not now sue the plaintiff either on the bills or for the consideration for which they were given, if the bills were equal in amount to such consideration: see *Peacock* v. *Pursell.* (1) But, in this case, the acceptor was unable to pay the bills; and their cancellation under the circumstances disclosed in this case is not in our opinion equivalent to payment in full.

The circumstances which led to the giving of the bills, and to their subsequent cancellation appear in paragraphs 2, 3, 6, 7, and 9 of the special case, which I will not stop to read now. The defendants in effect lent the plaintiff 15,000*l.* on the security,—1, of certain tramway materials, and,—2, of the bills of exchange in question. The tramway materials were not to be sold without notice to the plaintiff. When the bills were dishonored, the 2500*l.* was given as collateral security for their payment. In other words, the 2500*l.* was given as further security for the loan of 15,000*l.* Afterwards, the plaintiff authorized a sale of the materials; but the defendants found that they could not sell them without taking legal proceedings for the purpose against

(1) 14 C. B. (N.S.) 728; 32 L. J. (C.P.) 266.

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Santayana. Such proceedings were taken, and he ultimately consented to a sale on the terms of having the bills cancelled, which was done.

It is plain that by this arrangement the defendants did not intend to give up any security they held, except the bills; and it was admitted that the materials and the 2500*l.* together were not more than sufficient, and indeed *not* sufficient, to repay the loan of 15,000*l.* to secure which they were given. Further, it was not contended that the bills would have been paid in full by Santayana if they had not been cancelled; but, unless they would, their cancellation did not of itself discharge the debt of 15,000*l.* and entitle the plaintiff to have back the securities held by the defendants for it. So long as that debt or any part of it remains unpaid or unsatisfied or undischarged, it appears to us that the plaintiff cannot recover any of the securities given for it.

The defendants were entitled to appropriate the 2500*l.* to the discharge of that debt as soon as they received the money; and they are entitled to be treated as having done so, and are not, in our opinion, bound to refund that sum or any part of it to the plaintiff, unless on taking a proper account a balance is found to be against them.

The terms of the letter of the 27th of April, 1874, to our minds support the view we take,—"When they (i.e. the six bills) are paid, with charges, you will of course refund us the 2500*l.*" The event contemplated, viz. the payment of the six bills in full, with charges, has not happened; and, when consent was given by the plaintiff to the sale of the materials, it was, we think, assumed that the bills would not be paid, and the sale of the materials was left to the discretion of the defendants. The agreement pursuant to which the bills were cancelled was not an agreement to the effect that they were to be treated as paid, but was an arrangement for paying them; and, until they have been paid in fact, they ought not (although cancelled) to be treated as paid, within the true meaning of the letter of the 27th of April, 1874.

The real right of the plaintiff in our opinion is, to have an account taken of what is due to the defendants in respect of the original loan and interest, and of what they have realised or might

but for their own negligence have realised by means of their securities. The defendants, in other words, are liable to be charged in account with the real value of the cancelled bills, but are not to refund the 2500*l.*, which is the contention of the plaintiff.

For these reasons, we give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Nicol, Son, & Jones.*
Solicitors for defendants: *Mackrell & Co.*

[IN THE COURT OF APPEAL.]

Nov. 6.

STANDARD DISCOUNT COMPANY *v.* OTARD DE LA GRANGE.

Practice—Order empowering Plaintiff to sign Judgment upon specially indorsed Writ—Final or Interlocutory Proceeding—Appeal from High Court of Justice—Time within which Appeal must be brought—Rules of Supreme Court, Order XIV., and Order LVIII., Rule 15.

An order empowering a plaintiff to sign judgment upon a specially indorsed writ is an interlocutory, and not a final proceeding, for it does not become effectual against the defendant until it has been perfected by the further step of signing the judgment; and therefore an appeal upon an order of this kind made by one of the divisions of the High Court of Justice must be brought before the expiration of twenty-one days.

THE writ in this action having been specially indorsed, a master made an order under the Rules of the Supreme Court, Order XIV. (1), empowering the plaintiffs to sign judgment.

(1) By the Rules of the Supreme Court, Order XIV., Rule 1 (as altered by the Rules of the Supreme Court, May, 1877), "Where the defendant appears to a writ of summons specially indorsed under Order III., Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. . . . . The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle

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From this order the defendant appealed to a judge at chambers, who confirmed the master's decision. He then appealed to the Common Pleas Division, who refused to overrule the decisions of the master and judge. The date of the hearing in the Common Pleas Division was the 8th of August, 1876. The defendant, after the expiration of twenty-one days from that date, applied for special leave to appeal; but on the 25th of April, 1877, this Court declined to grant the application. The defendant then, by a notice dated upon the day last-mentioned, appealed from the judgment of the Common Pleas Division.

Nov. 5, 6. *W. G. Harrison, Q.C.*, for the plaintiffs. In this case there is a preliminary objection. This appeal from the Common Pleas Division is too late. The plaintiffs obtained a master's order empowering them to sign judgment under Order XIV., Rule 1. That order was affirmed by a judge, and on appeal by the Common Pleas Division, and an application to extend the time to appeal was refused. The defendant now treats the order as a final judgment, and contends that he has a year within which to appeal. An order to sign judgment under Order XIV., Rule 1, is interlocutory, and an appeal must be brought before the expiration of twenty-one days. This appeal is in reality an application to rescind the order under which judgment may be signed. Suppose that leave to defend had been given by the Common Pleas Division, would not the plaintiffs have had to come to this court within twenty-one days? In that event the decision by the Court

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him to defend, make an order empowering the plaintiff to sign judgment accordingly."

Order XLI. relates to the entry of judgments.

By Order LVIII., Rule 15, "No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal."

The Supreme Court of Judicature Act, 1875, s. 12, after providing for the hearing of final and interlocutory proceedings before the Court of Appeal, enacts: "Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal."

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below against the plaintiffs clearly would be interlocutory. The present order is interlocutory, although the judgment signed pursuant to it will be final. If execution issued on the order, then it might be contended that it was final; but judgment must be signed pursuant to the order before execution can issue.

Anderson and *Warmington*, for the defendant. This order is final. The effect of it is to enable the plaintiffs to sign a final judgment. It may be admitted, that when leave to defend is given, the action goes on, and the proceeding is clearly interlocutory, but if judgment is allowed to be signed the order is final. If an order is made in the course of a cause to do something, it is interlocutory; but if the effect is to bring the cause to an end it is final; to ascertain whether an order is final or interlocutory, the consequences of the order must be considered. A judgment signed upon such an order as this, is decisive as to both parties. *Cummins* v. *Herron* (1), is not against the defendant, for in order to render the certificate of a chief clerk binding upon the parties, it must be approved of by the judge; and therefore the refusal to vary it, although the summons has been adjourned into Court, is clearly interlocutory.

[*W. G. Harrison, Q.C.*, referred to *White* v. *Witt.* (2)]

White v. *Witt* (2) is merely a case of an appeal against an order varying the certificate of a chief clerk. The decision in it proceeded upon the same ground as that in *Cummins* v. *Herron.* (1) In Wharton's Law Lexicon, p. 492 (6th ed.), the word "interlocutory" is defined as "that which is decided during the course of an action or suit, and does not determine it; intermediate; not finally determinate;" here the order determines the position and rights of the parties to the action, and therefore it cannot be interlocutory.

W. G. Harrison, Q.C., was not heard in reply.

BRAMWELL, L.J. I am of opinion that this preliminary objection must prevail. There cannot be an order which is neither final nor interlocutory; and therefore if the order before us is not final, it must be interlocutory. Is it a final order? It is like every other order in one sense final, so long as it is not appealed

(1) 4 Ch. D. 787. (2) 5 Ch. D. 589.

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against, but it is not the final order of the Court in the cause, because in order to entitle the plaintiffs to levy execution there must be a subsequent direction by the Court. Therefore, I think it is an interlocutory order. I think several illustrations may be given to shew that this is an interlocutory order. First, it is not obligatory on the plaintiffs, for if they think fit, they need not avail themselves of it; they may wish to proceed in some other manner; this is not very likely, but I can conceive cases in which a plaintiff may not wish to enforce such an order as this; for instance, if he sues for a debt bearing interest at five per cent., and thinks the defendant likely to become insolvent, he may desire both to be able to issue execution at any moment and yet to postpone the entry of the judgment, wishing to have interest at that rate to the day of entering judgment, rather than to enter judgment at once, and thereby to receive interest only at four per cent. Again, if another defendant is on the record, the plaintiff may say, "I have to try this action against that other defendant, and I would rather go on against both; I shall be sure of one of the defendants, because I am at liberty to sign judgment against him." I only put these cases as possible. I may give another illustration: suppose judgment to be signed and an appeal brought on the judgment—it is unnecessary to consider whether it would be successful or not—it clearly must be brought from the time when judgment was signed and not from the date of the order. Now, if there is a year within which to appeal from the order, and afterwards a like period to appeal from the judgment, that would give rise to a state of things which I think the legislature never intended.

I wish to make an observation upon the language of Order XIV., Rule 1; the last clause does not provide that "the Court or a judge shall give judgment;" if those words had been used I think that an order obtained by a plaintiff would not have been interlocutory within the meaning of Order LVIII., Rule 15; but this is not the language of Order XIV., Rule 1, and the words actually used are not equivalent to it: they are—I omit what it is unnecessary to mention—"the Court or a judge may make an order empowering the plaintiff to sign judgment." The distinction is not a mere refinement. The difference seems to me intentional,

and, in my opinion, it was not meant that the Court or a judge should give judgment, but should merely give a direction as to the mode in which the action should be conducted. If the words had been such as I have suggested, no further step would have been necessary to enable a plaintiff to issue execution, for the formal signature of the judgment would be merely the record that it has been pronounced.

I desire, further, to point out that in a proceeding of this kind a defendant is not under any hardship; he is no doubt concluded, if the plaintiff sign judgment and if there be no appeal, but the defendant has the right within a specified time to appeal against the order itself, and if that time be insufficient, he may, in a proper case, obtain an extension of it.

In my opinion, an order empowering a plaintiff to sign judgment is interlocutory, and an appeal against it must be brought within twenty-one days; that time had expired when notice of appeal was given in the present case, and therefore this appeal must fail.

BRETT, L.J. I have not had in this case so clear an opinion as Lord Justice Bramwell, but I agree that the order obtained by the plaintiffs is interlocutory. My reason for so holding is, that the order is not the last step which must be taken in order to fix the status of the parties with respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken, the plaintiffs cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed, and that step is the entry of the judgment. The order was not the final step in the action, and therefore it is interlocutory.

I think that our decision may perhaps be founded upon another ground, namely, that no order, judgment, or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff; whereas if the application for leave to enter final judgment had failed, the matter in dispute would not have been determined. If leave to defend had been given, the action would have been carried on

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with the ordinary incidents of pleading and trial, and the matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute.

COTTON, L.J. I am of opinion that this is an interlocutory order, and that the time for appealing against it is the shorter period of twenty-one days. The decision in *White* v. *Witt* (1) may not be our sole guide in determining this case; but at least it shews this, that an order may be interlocutory and subject to appeal only within the shorter period, although it really decides that on which the judgment of the Court, admittedly final, is ultimately given. In *White* v. *Witt* (1) the order varying the chief clerk's certificate as to the validity of the settlement in effect decided the rights of the parties, because the order upon further consideration was made in accordance with it; yet it was held to be interlocutory. Now, it is no doubt the fact that, if the order obtained by the plaintiffs be not set aside, they will be able to sign judgment against the defendant; but *White* v. *Witt* (1) certainly shews that, although the effect of a final judgment will result from making an order unless it be set aside, still this circumstance does not prevent the order from being interlocutory, and subject to appeal only during the shorter period. Without using an exhaustive definition, it may be laid down that an order is interlocutory which directs how an action is to proceed; and the order before us is exactly of that kind. The Rules of the Supreme Court, Order XIV., Rule 1, allow a plaintiff, so soon as the defendant has appeared to a specially indorsed writ, to apply to a master or a judge and to obtain an order, which will prevent the action from going through its ordinary course, and will give the plaintiff liberty at once to sign judgment without taking the usual steps; the order, however, relates to the procedure, and therefore is only interlocutory.

Further, I am of opinion that to allow the longer period of appeal would defeat the object of Order XIV.; that object, no

(1) 5 Ch. D. 589.

doubt, was to put an end to defences set up simply for the purposes of delay, and by a summary proceeding to enable a plaintiff at once to get judgment and enter it against the defendant; this is another ground for holding that an appeal must be speedily brought.

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Appeal dismissed.

Solicitors for plaintiffs: *Argles & Rawlins.*
Solicitor for defendant: *A. G. Ditton.*

[REGISTRATION CASES.*]

Nov. 19.

BEAL, APPELLANT; FORD, RESPONDENT.

Parliament—Borough Vote—"Residence" within the Borough or within Seven Miles thereof—Reform Act, 2 Wm. 4, c. 45, s. 33.

The residence required to entitle a person to be registered as a voter for a borough, under s. 33 of the Reform Act, 2 Wm. 4, c. 45, need not be an occupation as owner or tenant; but any actual residence for the prescribed period within the borough, or within seven miles thereof, is sufficient.

For a portion of the six months previous to the last day of July in the qualifying year, viz. from the 29th of March to the 29th of May, A. lived and slept with his wife and child in a room in a cottage allotted to the wife's mother by the trustees of a charity, the rules of which prohibited the inmates from allowing any stranger to reside with them:—

Held, that this was a sufficient residence to satisfy s. 33; and that the continuity of residence was not broken by A.'s absenting himself for one night, when sent to London upon his employer's business.

APPEAL from the revising barrister for the borough of Exeter.

Brutton John Ford duly objected to the name of James Beal being retained on the list of persons entitled to vote in the election of members for the borough of Exeter, in respect of his freehold house in Alban Place, in the parish of Heavitree, on the ground that Beal had not resided for six calendar months next previous to the last day of July, 1877, within the borough or within seven miles thereof, pursuant to 2 Wm. 4, c. 45, s. 33. The following facts were proved:—

The qualification of Beal was duly proved and admitted in all other respects.

* For convenience of reference the Registration Cases for this year are collected here.

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On the 31st of July, 1876, the appellant (Beal) resided in a house (which he occupied as tenant) situate in Queen's Road, St. Thomas-the-Apostle, in the borough, where he continued to reside until the 29th of March, 1877.

On the 29th of March, the appellant's term having expired, he gave up possession of his residence in Queen's Road, and he, his wife and child, of necessity went to his wife's mother's house (at her invitation), with the intention of remaining there, if he was so permitted, until he could obtain a suitable dwelling-house within the borough.

The mother-in-law of the appellant resides at No. 3, Mount Durham, within the borough. The house so occupied by her is one of a number of houses called "The Free Cottages" which were given by the trustees of the same to inhabitants of Exeter, to be occupied free of rent during the pleasure of the trustees.

The following are the printed rules of the "Free Cottages":—

RULES CONTAINED IN THE TRUST-DEED.

Except in the case of a married couple, no person shall reside with any inmate except by permission of the trustees.

Every inmate, by whomsoever nominated, shall be subject to the rules and orders of the trustees, and shall be subject to dismissal by the trustees, as hereinafter mentioned.

The trustees shall from time to time have full power and authority to remove and displace any person from the cottages who shall wilfully transgress such rules or orders, or be guilty of other misconduct.

BYE-LAWS AND REGULATIONS.

1. No inmate shall receive parochial relief without the special consent of the trustees; and every inmate shall be considered as occupying during the pleasure of the trustees.

2. Any inmate marrying shall within one week give notice thereof to the trustees, who will be at liberty to regard such marriage as a forfeiture of the cottage; and the like regulation shall apply to the withdrawal of the guaranteed allowance to any inmate, or any material alteration in his or her circumstances.

3. The inmates are required to keep themselves and their houses always perfectly clean and neat, and to conduct themselves in a quiet, sober, and orderly manner. Quarrelling is strictly forbidden; and, for the maintenance of charity and good feeling, they are enjoined not to interfere with each other's affairs.

4. No inmate will be allowed to carry on any handicraft trade in the cottages.

5. No inmate will be allowed to be absent from his or her dwelling more than a month at any one time, without the consent of the trustees.

6. If any damage be done to the roof of any cottage or otherwise, the inmate shall report the same immediately to the clerk.

7. Each cottage will be visited at least once in every quarter by the clerk, who will report to the trustees at their general meetings as to the observance of the foregoing regulations.

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From the 29th of March to the 29th of May in the present year, the appellant (with the exception of one night, the night of the 2nd of April, 1877, when absent in London on business) continuously lived and slept in the house so occupied by his mother-in-law. The appellant's wife and child lived and slept in the house of the appellant's mother-in-law every day and night throughout the whole period from the 29th of March to the 29th of May; during the whole of which time the appellant, his wife and child, exclusively occupied one sleeping apartment in the house, but lived during the day in certain other rooms in the house, and occupied them in common with the appellant's mother-in-law, and during this period had no other residence or dwelling within the borough, or in any other place.

The appellant's mother-in-law had not obtained any permission from the trustees, as required by Rule 1, to have her son-in-law reside with her.

The appellant did not pay his mother-in-law for such use and occupation; but lived there as her guest, without interruption or interference on the part of the trustees, until the 29th of May, when he went to reside in the house in which he is now residing, which house is also within the borough.

The appellant is clerk to a solicitor carrying on business in Exeter.

On behalf of the objector, it was urged that, from the 29th of March to the 29th of May, the voter had no residence within the borough or within seven miles thereof,—first, because the room which he used at his mother-in-law's house was used by him as her guest or visitor,—secondly, because the house in which he resided for this time being an almshouse, the occupier had no right by the rules of the "Free Cottages" to give him the separate and entire use and occupation of any room in the house. The case of *Ford* v. *Pye* (1) was relied on.

On behalf of the voter it was urged, that, during the whole of the six months previously to the 31st of July, 1877, he actually resided within the borough; that the residence at his mother-in-

(1) Law Rep. 9 C. P. 269.

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law's was bonâ fide, and that he went there with the intention of remaining there until he could find another suitable dwelling, and did remain there until that object was accomplished; that he had had the separate and entire use and occupation of a sleeping apartment in the house of his mother-in-law, without interruption on the part of the trustees, during the time he resided there; that he was a tenant-at-will of the said room of his mother-in-law; that, in the case of a freehold qualification, all that was required was that the voter should actually and bodily reside within the borough or within seven miles thereof; that the words of the statute, "shall have resided" should be read as "shall have lived or have had a residence or dwelling;" and that *Ford* v. *Pye* (1) did not apply.

The revising barrister decided that the residence required by the Act is that of a bonâ fide inhabitant having a domus of his own within the distance therein set out; that Beal between the 29th of March and the 29th of May, 1877, was a trespasser ab initio, or at most a visitor in the house of his mother-in-law; and that the six months' residence was thereby interrupted. He therefore expunged his name from the list.

The question for the opinion of the Court was, whether, consistently with the facts, he could legally find that Beal had not resided for the six calendar months next previous to the last day of July in the present year within the borough.

Charles, Q.C. (*Bucknill* with him), for the appellant. The question turns upon the meaning of "residence" in s. 33 of 2 Wm. 4, c. 45, which imposes as a condition to the right of a freeholder to be registered as an elector for a city or borough, that he "shall have resided for six calendar months next previous to the last day of July" within the city or borough or within seven statute miles from the place where the poll is taken. Before the passing of the Act it was immaterial where the voter resided: but the statute has not defined the quality of the residence, as s. 27 has that of an "occupier," viz. "as owner or tenant." The residence described in this case would have been abundantly sufficient to confer a settlement under 13 & 14 Car. 2, c. 12. In *Rex* v. *Sowton* (2) a much more slender habitation than this was

(1) Law Rep. 9 C. P. 269. (2) Andr. 345.

held to render a pauper irremovable. Assume that the appellant here was a trespasser while living in the house of his mother-in-law, how can that affect his qualification as a voter?

Bompas, Q.C., for the respondent. The word "residence" necessarily implies something more than the merely *being* in a place. The place in which he is must, to satisfy the 33rd section of the Reform Act, be his *home*. In *Whithorn* v. *Thomas* (1) the claimant had a residence and domicil at Gloucester, and for the purpose of obtaining a vote for Tewkesbury he paid to a friend the sum of 9*d*. a week for the use of a furnished bed-room and a dark closet, of which closet he kept the key; and between January and July, 1844, he slept in the bed-room a dozen times: and it was held that this was not a sufficient residence to confer a vote under s. 27. In giving judgment, Tindal, C.J., said (2): "The residence required by the statute must mean an actual occupation for some part of the time specified by the party himself or an occupation by his family or servants. It is impossible upon this dry statement of facts that the law should pronounce that they constituted a residence in Tewkesbury." And Erle, J., said: "The intention of the legislature was, that a party who obtained a vote by residing in a borough should have some local interest there,—referring to the ordinary meaning of the word *residence* as conveying the idea of *home*." So, in *Powell* v. *Guest* (3) a detention in a gaol more than seven miles from the borough, the claimant's business continuing to be carried on by a servant, and his furniture remaining all the time at his premises within the borough (he being a widower, without a family), was held not enough to confer a qualification. The Court there adopts the definition of "residence" given in Elliott on Registration, 2nd ed. p. 204. The main object of the enactment,—which is, to make it easy for intending objectors to ascertain whether or not the condition thereby imposed has been fulfilled,—will be frustrated if such an uncertain residence as this will suffice. To satisfy the requirements of the statute, the residence must be uninterrupted and of right. In *Ford* v. *Pye* (4), a clergyman claimed to be qualified to vote for a borough in respect of a

(1) 7 M. & G. 1.
(2) At p. 8.
(3) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69.
(4) Law Rep. 9 C. P. 269.

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dwelling-house above the value of 10*l.* in which he usually resided. He entered into an arrangement with another clergyman by which they agreed to exchange duties and residences for a certain period, for the purpose of obtaining relaxation and change of scene. In pursuance of this arrangement, the claimant left his house and resided for two months (which included the last month of the qualifying year) at a distance of more than seven miles from the borough, in the house of the other clergyman, who came and resided during the same period at the claimant's house; and the Court held that there was a break of residence which prevented the claimant from being duly qualified. Settlement cases have no analogy whatever to the matter under consideration. In no sense could the appellant's residence in the "Free Cottages," which was in breach of the rules contained in the trust deed, be such as to satisfy the 33rd section of the statute. If the requirement is satisfied by the mere being or existing in or within the prescribed distance from the borough, a break in its continuity for however short a period will be fatal: and here it is found that the appellant went away from Exeter, and was absent for a night in London.

DENMAN, J. I am of opinion that upon the only point which the revising barrister has left to us our decision ought to be for the appellant. The ground upon which the revising barrister decided as he did was that the residence required by the Act is that of a bonâ fide inhabitant, having a domus of his own within the distance therein set out. What he afterwards states as to the appellant's residence does not seem to me to be important with reference to the question upon which the decision turns. Sect. 33 of 2 Wm. 4, c. 45, gives the vote to persons having a certain property qualification; and it requires that the voter shall have resided for six calendar months next previous to the last day of July within the city or borough or within seven statute miles. I cannot hold that residence there has the same meaning as in other statutes or sections applicable to a totally different subject-matter. We are all aware of the great inconvenience which was formerly occasioned by voters being brought from long distances to take part in the election in a city or borough in which they

had no direct interest. I take it that it was in consequence of that, more than for any other reason, that the legislature required residence. But I do not think they contemplated that for which Mr. Bompas has contended. It appears to me that this person was a resident within the borough. He dwelt in a house which is admitted to be in Exeter. It is said that for part of the six months, viz. from the 29th of March to the 29th of May, his tenure was a precarious one. That, however, does not affect the question. Then it was said that absence even for a single day would break the continuity of the residence. That seems to me to be a fallacy. We must look at the substance of the thing; and, so looking at it, I do not think that this appellant, because he happened to be away in London for one night, was the less a resident in the borough for six months next previous to the last day of July. I therefore think the decision of the revising barrister was wrong; and, looking at the supplemental finding (1), I think it highly probable that the case was stated because his attention was not pointedly called to the difference in the kind of residence required to make out the one qualification from that required for the other.

LINDLEY, J. I am also of opinion that the decision of the revising barrister must be reversed. The question is what is meant by "reside" in s. 33 of the first Reform Act? In point of fact the voter lived in the borough of Exeter in this way:—In July, 1876, he resided in a house within the borough, and continued so to reside until the 29th of March, 1877, when he and his wife and child went to reside with his wife's mother in one of a number of houses called the Free Cottages; and there he remained until the 29th of May (with the exception of one night when he was absent in London, on business), when he removed to a house of his own, also within the borough. I do not see why the temporary residence in the almshouse during the six months should not be held to be a residence within the borough. The only objection to it is, that he might at any moment have been turned out by the trustees. Be it so: that does not alter the fact of residence. Nor can I think that his going to London and remaining absent

(1) The case as originally stated referred to s. 27 instead of s. 33.

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from Exeter for one night was a breach of the continuity of his residence. The appeal must be allowed, but without costs.

Decision reversed.

Solicitor for appellant: *S. Hamilton, for J. W. Friend, Exeter.*
Solicitors for respondent: *J. E. Fox & Co., for J. B. Ford, Exeter.*

Nov. 20.

GRANT, APPELLANT; THE OVERSEERS OF PAGHAM, RESPONDENTS.

Parliament—Borough Vote—Disqualification by Reason of Bribery—31 & 32 *Vict. c.* 125, *s.* 43.

In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge and consent, under 31 & 32 Vict. c. 125, s. 43, he must be *found* by the report of the election judge under s. 11, sub-s. 14, to have been so guilty; it is not enough that the judge states facts from which personal bribery or other corrupt practice might be inferred.

APPEAL from the revising barrister for the Western Division of the county of Sussex.

Albert Grant claimed to have his name inserted in the list of voters for the western division of Sussex, as being duly qualified in respect of his ownership of freehold property in Pagham. He was duly objected to.

Grant was proved to be duly qualified, unless the objection herein mentioned was a valid one. The objection was that, Grant having been returned by the returning officer for the borough of Kidderminster as having been duly elected on the 31st of January, 1874, to serve in parliament for that borough, a petition had been presented against such election and return, and at the trial of the matters alleged in such petition before Mellor, J., the election judge appointed to try the same, such election and return were determined to be null and void; and that the certificate and report made by Mellor, J., as such election judge on the trial of that petition, and dated the 17th of July, 1874, rendered Grant incapable of being registered as a voter and voting at any election in the United Kingdom during seven years next after the said 17th of July, 1874. The certificate and report, so far as the same is material, is as follows:—

Now, I, Sir John Mellor, knight, one of the judges on the rota for the trial of

election petitions in England, having, according to the Parliamentary Elections Act, 1868, tried the matters alleged in the said petition and determined the same, do hereby certify and report that at the trial of the matters alleged in the said petition, I determined that the said Albert Grant was not duly elected and returned at the said election, and that his election and return were and are wholly null and void: and, in compliance with the directions of the Parliamentary Elections Act, 1868, I further certify and report that it was proved before me that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854:

And I further report that the nature of such corrupt practice was the promising before and at the time of the said election to certain voters for the said borough of Kidderminster, and other inhabitants thereof, that the said Albert Grant would, in the event of his being elected at the said election, and after such return, give to such voters and other voters and inhabitants of Kidderminster an entertainment consisting, among other things, of meat and drink, with the view and intent to induce such voters to vote for him the said Albert Grant at such election:

And I further report that in the course of the trial it appeared more or less clearly that a number of voters had been induced to vote for the said Albert Grant, by virtue of a promise made to them by persons canvassing them for their votes that their names should be put down upon a committee, and that it would be worth to them 10s. each when all was over; and, in other cases, that they would be paid for their services when it could be done with safety; but, inasmuch as in some cases the persons implicated were not clearly identified, and in other cases the counsel for the respondent did not call them to contradict or explain the circumstances, on the ground that their evidence did not affect Grant, I think that I cannot safely report the names of any persons as having been proved to have been guilty of bribery. I am not able from the evidence before me to report that there is reason to believe that corrupt practices extensively prevailed at the said election.

There was evidence of a good deal of illegal treating during the election. But it was not proved to my satisfaction to have been corrupt.

The evidence proved before the revising barrister, and admitted by the claimant and the objector as common to both, consisted of a return to an order of the House of Commons dated the 12th of June, 1874, of a copy of the shorthand-writer's notes of the judgments delivered by the judges selected in pursuance of the Parliamentary Elections Act, 1868, and ordered by the House of Commons to be printed on the 5th of August, 1874. With the consent of the parties, a copy of the return was annexed to the case as part thereof; and for the purposes of the appeal the facts stated in the judgment and certificate of Mellor, J., were incorporated in the case as facts proved before the revising barrister.

After hearing the arguments, the revising barrister decided and determined, "having regard to the distinction existing between

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bribery and treating as affecting a voter's mind, and that treating, as defined in the Corrupt Practices Act, 1854, does not include a promise to treat, but that bribery as defined in the said Act does include a promise to give, and having regard to Mr. Justice Mellor's judgment and certificate, and to the nature of the promised entertainment and the value of the proposed accompanying gifts, as set forth in Mr. Justice Mellor's judgment, and for other reasons, that the corrupt practice reported by Mr. Justice Mellor to the House of Commons to have been committed by Grant at the Kidderminster election was and amounted to bribery, within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, and the Parliamentary Elections Act, 1868, and was not treating, as contended before me on his behalf, and that consequently it was found by the said report that bribery had been committed by the said Albert Grant at the said election :" and he accordingly disallowed his claim to have his name inserted in the list of voters.

If the Court should be of opinion that the corrupt practice found by the report of Mellor, J., to have been committed by Grant at the Kidderminster election was and amounted to bribery, within the true intent and meaning of the above-mentioned Acts, and that it was found by the report that bribery had been committed by Grant at that election, the decision of the revising barrister so far as it disallowed his claim was to be affirmed. If the Court should be of a contrary opinion the decision was to be reversed.

Nov. 19, 20. *Pollard*, for the appellant. In order to disqualify Mr. Grant as an elector under s. 43 of the Parliamentary Elections Act, 1868 (1), he must be found by the election judge to have

(1) 31 & 32 Vict. c. 125, s. 43, enacts that, " where it is found by the report of the judge upon an election petition under this Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his being found guilty; and he shall further be incapable during the said period of seven years,—(1) of being registered as a voter and voting at any election in the United Kingdom," &c.

been personally guilty of bribery, or of being cognisant of and consenting to bribery committed by an agent. The only question before the revising barrister was, and for the Court upon this appeal is, whether the election judge has or has not so found. In order to bring a person charged within the scope of this highly penal Act, the offence must be shewn to be within the letter as well as within the spirit of the enactment: *Lord Huntingtower* v. *Gardiner* (1); *Britt* v. *Robinson.* (2) In the last-mentioned case, Willes, J., says (3): "When an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the legislature includes the offence in question, and makes it criminal." Here, the election judge has not found that the appellant was guilty of bribery, but merely that he was "guilty of a corrupt practice within the true intent and meaning of the Corrupt Practices Prevention Act, 1854." (4) The Act of 1868 creates a new offence, and different language is used. It is true the report goes on to state what was the nature of the alleged corrupt practice; and that which the learned judge reports may or may not amount to bribery; but he has not so found; and neither the revising barrister nor the Court can infer it. The disqualification only attaches upon the election judge *finding* that the facts proved before him amount to bribery.

[It was also contended that the facts alleged in the report did not amount to bribery, but at most to a promise to bribe at some future time, inasmuch as a promise to treat is not treating. The following cases were referred to, *The Wallingford Case* (5), before Blackburn, J., *The Bodmin Case* (6), before Willes, J., *The Hereford Case* (7), before Blackburn, J., *The Brecon Cases* (8), before

(1) 1 B. & C. 297.

(2) Law Rep. 5 C. P. 503.

(3) Law Rep. 5 C. P. at p. 513.

(4) 17 & 18 Vict. c. 102, s. 36, enacts that, "if any candidate at an election for any county, city, or borough shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in parliament for such county, city, or borough during the parliament then in existence."

(5) 1 O'M. & H. 57.

(6) 1 O'M. & H. 117.

(7) 1 O'M. & H. 195.

(8) 2 O'M. & H. 33, 43.

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Lush, J., *The Poole Case* (1), before Grove, J., *The Launceston Case* (2), before Mellor, J., and *Drinkwater* v. *Deakin.* (3)]

The respondents did not appear.

GROVE, J. I am of opinion that the decision of the revising barrister must be reversed. I regret very much that the case has been argued by counsel on one side only; for, it is always a great advantage to the Court to hear all that can be urged on both sides. We can, however, only act upon the materials which are presented to us. Upon the best consideration I can bring to the matter, I am of opinion that the finding of the election judge does not bring the case within s. 43 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), on which alone the appellant would be disqualified from being registered as a voter or voting at any election in the United Kingdom.

By s. 11, sub-s. 13, it is provided that, at the conclusion of the trial of an election petition, "the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the speaker, and, upon such certificate being given, such determination shall be final to all intents and purposes:" and by sub-s. 14 it is provided that, "where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judge shall, in addition to such certificate, and at the same time, report in writing to the speaker as follows,—(*a*) whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice,—(*b*) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice,—(*c*) whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates:" and sub-s. 15 provides that "the judge may at the same time make a special report to the

(1) 2 O'M. & H. 123. (2) 2 O'M. & H. 129.
(3) Law Rep. 9 C. P. 626.

speaker as to any matters arising in the course of the trial an account of which in his judgment ought to be submitted to the House of Commons." These enactments are extremely explicit and clear. Similar words are found in s. 43, which enacts that, "where it is found,"—not by the judgment, but,—"by the report of the judge upon an election petition under this Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void, and he shall be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his being found guilty; and he shall further be incapable during the said period of seven years, (1) of being registered as a voter and voting at any election in the United Kingdom," &c.

There cannot be a doubt that the learned judge has not reported in the terms of the statute, because he has not reported to the Speaker of the House of Commons that in this case a corrupt practice has been proved to have been committed with the knowledge and consent of the candidate; and it may be that the learned judge had in his mind when he found, as he does, "that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the corrupt Practices Prevention Act, 1854," that he had been personally guilty; but he does not find so; he does not use the words of the Act of Parliament; nor does he use words which unambiguously and necessarily involve a finding according to the Act of Parliament; and that the more appears because in the Corrupt Practices Act, s. 36, there is the term "guilty of corrupt practices" applied not necessarily to a corrupt practice with the knowledge and consent of a candidate at the election. The words are,—"If any candidate at an election for any county, city, or borough shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable," and so on; shewing that the Act did apply the term "guilty" to the candidate whether he did the act by himself or his agents; and the 46th section of the Parliamentary Elections Act is to my mind still stronger to support the same view, because

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it says, "For the purpose of disqualifying in pursuance of the 36th section of the Corrupt Practices Prevention Act, 1854, a member guilty of corrupt practices other than personal bribery within the 43rd section of this Act, the report of the judge on the trial of an election petition shall be deemed to be substituted for the declaration of an election committee, and the said section shall be construed as if the words 'reported by a judge on the trial of an election petition' were inserted therein in the place of the words 'declared by an election committee.'" There the Act expressly distinguishes between a member guilty of a corrupt practice and a member guilty of a corrupt practice by personal bribery, because it says, "A member guilty of corrupt practices other than personal bribery." The learned judge here has found that the candidate was guilty of "a corrupt practice," and therefore without the words "personal bribery" or "with the knowledge and consent of such candidate," primâ facie one would be inclined to take it to mean that the member was guilty of a corrupt practice, but not personal bribery. The words added to the offence in s. 46, and which make it another offence, are not used in the report of the learned judge, but only the words which by s. 46 do not necessarily alone imply personal bribery or bribery by his agents with his knowledge and consent.

I am therefore of opinion that, upon the face of this report, it is consistent with it that the candidate was guilty of a corrupt practice, but not guilty of a corrupt practice with his own knowledge and consent.

Then, the same absence of words explicitly importing the character of the corrupt practice under division (*a*) of sub-s. 14 of s. 43 is still wanting in the second branch of the report, which is to this effect,—"And I further report that the nature of such corrupt practice was the promising,"—the learned judge does not say by whom; he does not say promising by the candidate himself, nor does he say promising with the knowledge and consent of the candidate; but he says,—"promising before and at the time of the said election to certain voters for the said borough of Kidderminster and other inhabitants thereof, that the said Albert Grant would, in the event of his being returned at the said election, and after such return, give such voters and other

voters and inhabitants of Kidderminster an entertainment." That, therefore, does not fix it upon the candidate by an absolute and unavoidable implication any more than the first branch of the report; and, indeed, there is nothing in that report which may not be consistent with the candidate being guilty of a corrupt practice by and through his agents and without his own personal knowledge and consent.

I think, where you have to construe a penal Act, you ought to see that the offence, in respect of which you are to bring home the penalty against the person alleged to have incurred it, is proved to come clearly within that which the Act contemplates as being the offence. Here, judging by the report alone, it does not appear to me to be shewn upon the face of it, nor does it appear to me that there is any finding upon the face of it which brings the case within the 43rd section, viz. that bribery had been committed by or with the knowledge of the candidate at the election.

I also think that we ought not for this purpose to look at the terms of the judgment, for two reasons,—first of all, that, in cases where the judgment itself is a matter which the Court can look at, as a general rule the reasons for the judgment are not evidence for the Court, because the reasons or the observations made in giving the judgment are merely opinions entertained by the judge. The judge may make remarks in his judgment upon the conduct of witnesses, and upon various matters not essential to the act of giving judgment itself, and the Court cannot take sufficient cognisance of the reasons, which may or may not be right. The judge may have some good grounds for his judgment, upon which some other judges may differ, and yet they may agree in the judgment itself. Then, secondly, there is a stronger reason,—that the whole disqualification under s. 43 is made by the Act to depend, not upon the judgment of the learned judge, but upon the report of the judge on an election petition under this Act. Therefore it appears to me that we can only look upon the report of the judge upon the election petition; and the report, as I have stated, does not find that the candidate was guilty of a corrupt practice with his own knowledge and consent. It is consistent, therefore, with his having been guilty by his agents.

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That being so, it is unnecessary to consider the last point argued by Mr. Pollard, as to whether, although treating would not in itself be such an offence as to disqualify under this section, because it is distinguished from bribery in the Corrupt Practices Act, yet a promise to treat may or may not be an offence such as would disqualify under this section. Upon that I do not think it would be advisable to give any opinion, as, from the view I take upon the first point, it is unnecessary to decide it. Certainly my Brother Lush seems to have so regarded it; and obviously the argument would be a somewhat singular one, if treating itself be not a corrupt practice to disqualify, a promise to do that which in itself is not a corrupt practice, is a corrupt practice. However, it is unnecessary to decide that point; and I decide the case upon the first ground, viz. that there is no report here by the learned judge to the Speaker of the House of Commons that an act of bribery was committed with the knowledge and consent of the candidate.

Upon these grounds, I think the decision of the revising barrister must be reversed.

DENMAN, J. I entirely concur in regretting that this case should only have been argued by counsel on one side, because undoubtedly it is a case of considerable importance, though perhaps not so important as if we had felt ourselves in a position to decide all the questions which might be raised, and which indeed have been raised, in the course of the argument. It is partly for that very reason that, as we had not the assistance of counsel on both sides, my Brother Lindley and myself were anxious yesterday that the case should be discussed before a judge who has had so much experience in election matters as my Brother Grove, neither my Brother Lindley nor myself having as yet been called upon to exercise our judgment as election judges.

It appears to me that the case turns upon the short question whether here it has been found by the report of the judge upon the trial of the election petition that bribery has been committed by or with the knowledge and consent of the candidate, that is, the person whose vote is in question. The revising barrister has thought that, though in terms it was not so found, the report of

the judge did in fact amount to a finding to that effect. For the reasons I shall presently give, I do not agree with him.

The first point raised before us is, that no finding of the judge will suffice to disqualify the candidate within the meaning of s. 43, unless expressly and in so many words it is a *finding* that *bribery* has been committed by or with his consent, so that the mere omission which exists in this case of the word "bribery" would be fatal to any such effect in the finding. That may be so; and there is undoubtedly something approaching to an authority upon the subject, because I find in *Drinkwater* v. *Deakin* (1) that the Lord Chief Justice did, in giving his judgment draw a very marked distinction between a man being guilty and being shewn to be guilty dehors the report itself, and a declaration of his guilt by an election committee, or that which is now substituted for the proceedings before an election committee, viz. a report of the judge. But though it may be law that, unless there is a report expressly finding that *bribery* has been committed with the knowledge and consent of the candidate, there would be no disqualification under s. 43; still it must be acknowledged that some very startling results might be suggested. It might be suggested that, in a very few words an election judge might have reported facts which all the world and every tribunal would at once say amounted to a glaring assertion of bribery; and yet, if this construction is right, it would follow that there would be no disqualification, in spite of s. 43. I do not think it right, where it is not necessary to our decision, to pronounce an opinion upon so important a point,—taking into account that we have had the case argued only on one side. Therefore I do not decide the case upon that ground, though undoubtedly the argument is one which would have to be met hereafter with very strong counter-argument; and it may be that it would be a right holding: I do not at all say that it would not.

The next contention of Mr. Pollard is, that this section requires that there shall not only be a report of the judge containing upon the face of it beyond all question a statement of facts bringing the case within one of the definitions of bribery, but an actual *finding* by the judge, in so many words, that bribery has been committed *with the knowledge and consent of the candidate.* I do not intend

(1) Law Rep. 9 C. P. at p. 636.

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to decide that point, which is a debatable point, and which in all probability will have to be decided hereafter; but I do entirely agree with my Brother Grove that this is a case in which, making every fair intendment, as far as one has a right to make intendment in favour of a stringent enactment such as this, it does not appear with reasonable necessity that the judge has gone the length of finding facts conclusively shewing that here personal bribery was committed, that is to say, that any bribery has been committed by or with the knowledge and consent of the candidate. He has found that the candidate was guilty of a corrupt practice, he having stated that he finds that corrupt practice to have been the promise of an entertainment if he were elected; but many cases may be suggested, and indeed several cases have been suggested, in which those words might be literally complied with, and yet the candidate not found guilty of having personally any knowledge of the thing that had disqualified him. I so entirely agree with the observations of my Brother Grove upon it that I think it only necessary to say that I am prepared to decide the case, so far as I am concerned, upon that ground. I think with him that, though it may be unnecessary to use the express words of s. 43, there must be at least something that amounts to a statement which would with reasonable necessity be looked upon as equivalent to it; but there is no such statement in this case.

That renders it unnecessary to go into the question of whether, upon the balance of language, and according to the real meaning of the enactment, we should hold that, if the acts which are here stated to have been done were done with the personal knowledge and consent of the candidate, the clause relied on would apply. It appears to me that that is a very arguable point indeed. There is something startling, no doubt, in holding that a man is not liable to be disqualified for actual treating, and yet liable to be disqualified for a promise to treat. But I apprehend, on the other hand, that a promise held out deliberately to voters of something in the nature of an entertainment on the eve of an election to be carried out for their benefit, if it be for their benefit, or what they might think to be for their benefit, after the election, does look very like bribery according to the definitions in the Act; and

it may be that it would not be at all a stretch of the law as found in the enactment to hold it to be bribery, although, if there were no such promise, it would only be an act of treating. I wish to leave this question also entirely open for further consideration, if it arises on a future occasion: and I must not be understood as expressing any opinion upon it at all. I confine my judgment to the ground upon which my Brother Grove has proceeded, viz. that the words in this report do not with reasonable necessity imply knowledge or consent on the part of the candidate to what was done.

Upon these grounds I think that the decision of the revising barrister must be reversed.

LINDLEY, J. I am of the same opinion. In order to deprive the appellant of his vote, the case must be brought within s. 43 of the Parliamentary Elections Act, 1868; and the only question to answer is, whether the case is brought within that section or not. The language of the section is this: "Where it is found by the report of the judge upon an election petition under this Act that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void." There is no form of report given in the Act, and no actual words, I apprehend, which need be followed in order to bring the case within the section; but still, in the absence of a complete and express finding in so many words, that bribery has been committed by a candidate either personally or with his knowledge and consent, and where the report is consistent with the contrary view, that is not in my judgment sufficient to disqualify a voter.

Looking at this case, it appears to me that the election judge has not by his report, in terms either express or that which is equivalent to express language, found that bribery has been committed in the way mentioned in the 43rd section; and, although I think no particular words are necessary, still the report to disqualify, must be, I think, so clear and precise as to admit of no doubt or difference of opinion as to its meaning or legal effect. When I look at this report, I am by no means satisfied that, fairly

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construed, it does amount to anything like a statement of personal bribery as contemplated by s. 43.

Upon these grounds I agree with my learned Brothers that this appeal must be allowed.

Decision reversed.

Solicitors for appellant: *Robinson & Preston, and J. J. Ridley.*

Nov. 19.

BALLARD, APPELLANT; ROBINS, RESPONDENT.

*Parliament—County Vote—Amendment or Correction of Mistake in List of Voters—*6 *Vict. c.* 18, *s.* 40.

8 QBD 261

On the register of voters for a parish in a county, the name of a voter appeared under the heading "Voters in respect of property, including occupiers of 50*l.* and upwards." His true qualification was as a 12*l.* occupier, but his name had been omitted by the overseers from the list of 12*l.* occupiers made out by them, and he had made no claim to be placed thereon, as provided by 31 & 32 Vict. c. 58, s. 17:—

Held, that there had been a mistake in a list, within the meaning of 6 Vict. c. 18, s. 40, which should have been amended by the insertion of the voter's name in the list of 12*l.* occupiers.

APPEAL from the revising barrister for the county of Southampton.

On the register of voters for the parish of Lyndhurst, under the heading "Voters in respect of property, including occupiers at a rent of 50*l.* and upwards," the name of John Ballard, the appellant, appeared in its alphabetical order.

In the third column, under the heading "Nature of qualification," was inserted "Occupier of house and land rated at 12*l.* and upwards."

Notice of objection was given to the name of the appellant being retained on the list; the objection being to the third column and to the nature of his qualification. There were twelve other persons whose names appeared in this list in a similar manner and with a qualification similar to that of the appellant; and of these six had been objected to.

It was admitted that the appellant had not in fact such a qualification as to entitle him to be upon that list: but he had the qualification set out in the third column.

There was an alphabetical list of persons entitled to vote "in respect of the occupation as owner or tenant of lands or tenements of the rateable value of 12*l.* or upwards." (1) In this list the names of the appellant and the other twelve persons mentioned above did not appear, nor did he or they send notice of claim to be placed thereon before the 25th of August, as provided by 31 & 32 Vict. c. 58, s. 17. (2)

It was contended that, the appellant possessing a qualification which would entitle him to vote, it was a mistake his name appearing in the first-mentioned list, instead of in the 12*l.* occupiers' list; and that, under 6 Vict. c. 18, s. 40, this might be corrected by the revising barrister, by striking the name of the appellant out of the list in which it appeared, and inserting it in the 12*l.* occupiers' list.

The revising barrister was of opinion that he had no power to do this; and he struck out the names of the appellant and the six other persons objected to, and refused to insert them in the 12*l.* occupiers' list.

Ridley, for the appellant. The question turns upon s. 40 of 6 Vict. c. 18, which enacts that "the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification as stated in any list shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead, &c." Under this enactment the revising barrister had power to insert the name of Ballard in

(1) Sect. 19 of 31 & 32 Vict. c. 58, enacts that "in the lists and register of voters for a county the names of the persons in any parish or township on whom a right to vote for a county in respect of the occupation of premises in such parish or township is conferred by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), shall appear in a separate list after the list of voters in such parish or township otherwise qualified, and such separate list shall be deemed to be part of the lists of county voters of such parish or township, and shall be annually made anew by the overseers of such parish or township."

(2) 31 & 32 Vict. c. 58, s. 17, applies to this list the provision contained in 6 Vict. c. 18, s. 15, by which a person whose name is omitted from the list of voters for a city or borough may, before the 25th of August, give notice of his claim to the overseers, who are thereupon to include the names of all persons so claiming in a separate list, according to the form given in Schedule B.

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the list of 12*l.* occupiers. [Various sections of 6 Vict. c. 18, 30 & 31 Vict. c. 102, and 31 & 32 Vict. c. 58, were referred to for the purpose of shewing that "the list of voters" which the revising barrister has to deal with is an aggregate of the several lists which the overseers are required to prepare and lay before him.]

Hooper, for the respondent. What the revising barrister was asked to do here was, not to correct a mistake in the name of the voter or in the description of the qualification, but to transfer the name and qualification of Ballard from a list upon which his name ought not to have appeared, to a totally different list upon which he had never claimed to be placed. This clearly is not within the power of amendment conferred upon the revising barrister by 6 Vict. c. 18, s. 40. A person wishing to object would be misled by such a description as appeared here. Seeing that the appellant's name did not appear in the list of 12*l.* occupiers, which the overseers are by s. 19 of 31 & 32 Vict. c. 58, required to make out separately every year (1), he would look no further. [*Birks* v. *Allison* (2), *Bennett* v. *Brumfit* (3), and *Mather* v. *Overseers of Allendale* (4), were referred to.]

DENMAN, J. This objection turns mainly upon the construction of s. 40 of the Registration Act, 6 Vict. c. 18, which enacts that the revising barrister shall correct any mistake which shall be proved to him to have been made in any list; and, if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: provided always that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim; as the case may be, nor shall the barrister be at

(1) See note (1), ante, p. 93.
(2) 13 C. B. (N.S.) 12; 32 L. J. (C.P.) 51.
(3) Law Rep. 4 C. P. 407.
(4) Law Rep. 6 C. P. 272.

liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same. Here, the name of Ballard appeared on the register of voters, but he was placed in a list which was headed, "Voters in respect of property, including occupiers at a rent of 50*l.* and upwards," whereas he was only entitled to a vote in respect of a qualification as "occupier of house and land rated at 12*l.* and upwards;" and the objection taken was that his name appeared in the wrong place. The question is whether the 40th section enables the revising barrister to hold that the party's right to vote is gone because a subsequent statute, 31 & 32 Vict. c. 58, has enacted in s. 19 that the overseers shall make a separate list of 12*l.* occupiers, in addition to the list of county voters otherwise qualified. There is nothing, however, in that section to shew that it is to be a separate list, in the sense that it is not to be a portion of the list of the parish or township of the persons on whom a right to vote for the county in respect of the occupation of premises in such parish or township is conferred. So to hold would impose an undue burthen upon the overseers, and enable them to disqualify voters by placing them in a wrong part of the list. I do not think it is necessary so to construe the Act. The 40th section of 6 Vict. c. 18 in substance enables the revising barrister to correct "the list," into how many soever portions that list may for convenience be split. I am therefore of opinion that the revising barrister took too limited a view of his power of amendment, and that we ought to hold that the appellant has a right to a vote.

LINDLEY, J. I am of the same opinion. Upon the true construction of the Acts, I think the power to amend which is conferred upon the revising barrister under s. 40 of 6 Vict. c. 18, applies to all the lists which come before him for revision, whether under the old Reform Act or under the Representation of the People Act, 1867 (30 & 31 Vict. 102), or the Parliamentary Electors Registration Act, 1868 (31 & 32 Vict. c. 58). Here, the list of voters for the parish Lyndhurst is divided into two parts; one relates to "Voters in respect of property, including occupiers at a rent of 50*l.* and upwards;" the other to 12*l.* occupiers, to

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whom a right of voting is given by 30 & 31 Vict. c. 102, s. 6. It is the duty of the overseers to make out annually a list of the persons who are entitled to be upon the last-mentioned list. As to the objection that the power of the revising barrister to amend is limited to the amendment of mistakes in the list, provided they are not of such a nature as to be likely to mislead, and that the mistake in this case was likely to mislead, I do not think that any one desirous of seeing whether this person was duly qualified as a voter could have been misled by the mistake here made, and therefore I think it was one which the revising barrister had power to amend. I think the decision should be reversed, but without costs, the case being one of some importance.

Decision reversed. (1)

Solicitor for appellant: *John E. Coxwell, for W. Coxwell Lymington.*

Solicitors for respondent: *Bradby, Robins, & Son.*

(1) In *Bendle* v. *Watson* (L. R. 7 C. P. at p. 170), Brett, J., points out that "what is meant by mistake there (i.e. in the earlier part of 6 Vict. c. 18, s. 40), must be a mistake by the overseers." In the present case the name of the appellant appeared in the copy of the register received from the clerk of the peace, which the overseers are not empowered to alter, except by placing thereon marginal objections in certain cases: see 6 Vict. c. 18, s. 5. The overseers ought to have inserted the name of the appellant in the list of 12*l.* occupiers made out by them, but their omission to do this can be rectified under 31 & 32 Vict. c. 58, s. 17, in the manner pointed out in note (2) ante, page 93.

PHILLIPS, APPELLANT; SALMON, RESPONDENT. 1877
Parliament—County Vote—Freehold—Waste of Manor. *Nov.* 19.

A. claimed to vote for a county in respect of a lease of part of the waste of the manor of N. granted to him in 1861 by the lord for the lives of A., his son, daughter, and grandson, with a covenant to add lives, pursuant to a presentment made under the following circumstances:—At the courts-leet and courts-baron it had been the practice of the mayor and burgesses (who had rights of common of pasture over the wastes of the mayor) for one hundred years and upwards, to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases, the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed; such rents being very small sums, varying according to circumstances. No duration of the holding was specified in such presentments; but, upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the court-leet:—

Held, that A. had a sufficient freehold interest in the land so held by him (the value not being disputed) as to entitle him to be registered as a voter for the county.

APPEAL from the revising barrister for the county of Pembroke.

1. John Phillips duly objected to the name of John Salmon being retained in the list of voters for the county of Pembroke.

2. The name of Salmon appeared in the list of claimants to be entitled to vote for the county, as follows:—

Name.	Abode.	Nature of Qualification.	Street, Lane, &c.
Salmon, John.	Blaenwarrn.	Freehold lease of house and land.	Blaenwarrn.

3. In support of the claim, the claimant produced a lease duly executed, dated the 28th of February, 1861, whereby Thomas Davies Lloyd, in the lease described as lord marcher of the barony of Kernes, in the county of Pembroke, demised to the claimant, his heirs and assigns, the dwelling-house, outhouses, gardens, and lands called Blaen-y-Warrn, situate at Newport, in the barony of Kernes, reserving to the lessor mines and minerals, with the ordinary powers for working the same, To hold to the claimant, his heirs and assigns, during the lives of his son, daughter, and grand-

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son therein respectively named, and the survivors and survivor of them, at a yearly rent of 5*s.* payable to the lessor, who also thereby covenanted with intent so as to create a lien upon the reversion of the demised premises and all persons who should become entitled thereto, but not to create a personal charge upon the lessor, his executors or administrators, that he, his heirs or assigns, would grant unto the claimant, his heirs or assigns, a lease for adding a life on the said premises, to be named by the claimant, his heirs or assigns, upon the death of such one of the lives therein named as should first drop, and also a further lease for adding a life on the said premises upon the death of such one of the survivors of the lives therein named and the additional life as should first drop in manner therein mentioned. [A copy of the lease accompanied and was to form part of the case.]

4. The question on this appeal was, whether T. D. Lloyd had power to grant the lease for the lives of the persons named or any of them and in manner therein appearing, so as to create the qualification in respect whereof Salmon claimed.

5. No witnesses were called, nor any further documentary evidence given before the revising barrister; but the following facts were agreed upon between and by the parties in reference to the claim:—

6. The site of the dwelling-house and land called Blaenwarrn were formerly part of the waste of the manor of Newport, which manor is conterminous with the borough and parish of the same name. The barony of Kernes comprises several manors, one of which is the manor of Newport; and the barony also comprises twenty-six parishes, of which the parish of Newport is one.

7. At the time of granting the lease T. D. Lloyd was lord of the barony of Kernes, and as such lord of the manor of Newport. There are no copyholds in the manor.

8. The borough of Newport is governed by a mayor and burgesses, who have from time immemorial held courts called courts-leet and courts-baron for the borough. At one of such courts holden annually on the 29th of September it has been the custom for the burgesses to present three of their number, one being the mayor in office at the time, for the office of mayor for the following year. These presentments were delivered to the

lord, who thereupon elected one of such persons presented to him, and such person was thereupon sworn into office as mayor.

9. By a charter dated in 1192, Nicholas Fitzmartin, then lord of the barony, confirmed to his burgesses of Newport, then called Newburgh, certain liberties and customs which William, his father, had granted to them, and, amongst others, that they should have common of pasture in his land, and easement of wood for their houses and buildings and for firing, by view of the forester; likewise that they ought to have a bailiff and a common council for him and for them. This charter was exemplified and inrolled by the justices of the Great Session holden at Haverfordwest in the 34th year of the reign of Queen Elizabeth, on the application of the bailiff and burgesses of Newport; and it was again similarly exemplified and inrolled in the 5th year of the reign of James the First.

10. At the courts-leet and courts-baron it has been the practice of the mayor and burgesses for one hundred years and upwards to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed; such rents being very small sums, varying according to circumstances. No duration of the holding was specified in such presentments; but, upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the court-leet.

11. In the year 1838, disputes having arisen between the lord and certain of the persons holding under the above-mentioned circumstances, as to their liability to pay the said rents, the lord took proceedings to recover such rents from one of them, and recovered the amount thereof in an action tried at the assizes.

12. Since the date of such trial the successive lords of the barony have granted many leases similar to that under which the present claim is made, and the lessees have taken possession of the plots demised by such leases and have paid the rents thereby reserved. There was no evidence that such leases had been granted previously

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to such date; nor has any notice been taken of such leases on the court-rolls.

13. During the time that T. D. Lloyd was lord of the barony, extending from the year 1845 to the present year, the records of the courts-leet and courts-baron were headed as follows:—

"Town and corporation of Newport, in the county of Pembroke, Barony of Kernes, whereof Sir Thomas Davies Lloyd is lord of the corporation.

"The Court Leet and Court Baron held at Newport, within the said barony: Before me, A. B., Mayor."

14. The original presentment to the claimant of part of the lands in respect of which he claimed as aforesaid was made in the customary form by the jury at the court-leet holden on the 14th of May, 1841, and was in the words following,—"We present two pieces of ground on the common to John Salmon, weaver, northwards and westwards of Yetyrhose, admeasurement about 60 yards long by 30 yards; he to settle with the lord of the manor for the rent."

15. A further part of the said lands was presented to the claimant by the jury at a court-leet holden on the 26th of November, 1852; and such presentment was in the words following,—"We present to John Salmon, of Blaenwarrn, a piece of land on the common, bounded, &c. (mentioning the abuttals). The mayor will mark out the boundaries. The said John Salmon to settle with the lord of the manor for the rent. Received six pence in Court on account of rent." Then follow the names of the jurors.

16. A further part of the lands in respect of which he claimed was presented to the claimant by the jury at a court-leet holden on the 6th of November, 1855, and such presentment was in the words following,—"We present to Mr. John Salmon, of Blaenwarrn, all that piece or spot of land, being part of Newport Common, and situate near a house and garden the property of T. D. Lloyd, Esq., the said spot or piece of land to be of the extent of 60 yards by 30 yards, or thereabouts. The said John Salmon shall not incroach or stop up any public roads, and shall settle with the lord of the barony for the rent of the same spot of land. The mayor, accompanied by Mr. J. Llewellyn, Mr. T. Bevan, Mr. J. Harris, and Mr. W. Salmon, are hereby directed to mark out the

boundaries. Mr. John Salmon has on this day paid on account of rent the sum of one shilling." Then follow the names of the jurors. The sums of 6*d.* and 1*s.* paid on account of rent by the claimant were received by the steward as part of the rent to be fixed by the lord of the manor to be paid for the said plots of land respectively.

17. The lease executed by T. D. Lloyd to the claimant in manner aforesaid included the several pieces of land referred to in the three presentments hereinbefore recited, and included no additional or other land, and possession has been retained by him and rent paid to the lord until the present time, in accordance with the said lease.

18. The burgesses of Newport have from time immemorial exercised rights of common of pasture over the wastes of the manor of Newport. Such wastes consisted originally of 3000 acres or thereabouts within the manor, of which in the year 1861 about 300 acres had been inclosed and were then held in severalty under the presentments hereinbefore referred to; but a sufficiency of such waste lands was then and still is left for the use by the commoners of their said right of pasture. No right of turbary or estovers has been exercised by the burgesses; and there is no turf or trees within the said waste lands available for the user of either of the last-mentioned rights, if they exist.

19. It was contended for the claimant that the lord had a right to approve against common of pasture, leaving sufficient waste for that purpose; and, if so, that he had also a right to demise the lands so approved; and that there were no other rights of common in this manor. Moreover, that a custom so to demise was proved by the foregoing facts.

It was answered for the objector, that no right to demise could be incidental to the right to approve, without a custom; and that such custom was in this case only recent, and not of legal origin.

The revising barrister decided that the contention of the claimant was well founded. He inserted the name of Salmon in the list of claimants. If the Court should be of opinion that his decision was wrong, the register was to be amended by erasing the name of Salmon therefrom.

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Grantham, Q.C. (*Vernon Smith* with him), for the appellant. The burgesses of Newport, it appears, have a right of common in gross over the wastes of the barony. If so, the lord cannot approve by statute (1), but only by custom: *Lascelles* v. *Lord Onslow.* (2) The grant of the lease in question is stated to have been in exercise of the lord's right to approve; and there is no evidence whatever of a custom, the first lease being shewn to have been granted in 1838; and none having ever been entered or noticed in the court-rolls of the barony: it is manifestly a modern invention. The lease does not purport to have been made with the assent of the commoners.

[LINDLEY, J. The lease is at all events good as against the lord; and no dissent on the part of any one is shewn. It may be that the lease is subject to the rights of the commoners: but, there being no question of value, what is there to prevent the lessee from acquiring a right to vote?]

If the lord had no right to approve, the lease is void. In Elton on Commons and Wastes, 2nd ed. 238, it is said: "If an owner of land has by deed granted to a stranger the right of taking peat or turf for fuel, wood for repairs, fish for the sustenance of his family, or other profits of a similar kind, out of a particular parcel of waste land or a stream, where these may be found, without attaching the privilege to the ownership of any particular tenement, it seems to be clear that he cannot afterwards restrain the commoner to any lesser portion of the waste or stream. We know that, from the earliest times, inclosures were forbidden when a common of pasture in gross had been granted in this way; Year Book, 12 Hen. 3, fo. 26; 1 Rol. R. 365; and the same rule applies to other kinds of common in gross; thus, where one had granted a common of piscary through every part of a certain stream, and then excluded the commoner from part of the same on the formation of a mill-stream, on assize of common being brought, it was held that no such alteration of his grant was permissible:" 34 Ass. 11; Bro. Abr. Common, 26.

Sir H. James, Q.C. (*Tickle* with him), for the respondent. The ownership of the soil is in the lord, subject only to the commoners' right of pasture; for, the case expressly finds (in

(1) Statute of Merton, 20 Hen. 3, c. 4. (2) 2 Q. B. D. 433, 450.

par. 19) that no right of turbary or estovers has ever been exercised in this barony. In *Shakespear* v. *Peppin* (1) it was held that the lord of a manor, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other rights on the common, as, a right to dig sand, &c., if he leave sufficient common of pasture. Here it is found that sufficient common is left: see par. 18. The 10th paragraph of the case shews that it has been the practice for a century and upwards for the mayor and burgesses at courts-leet and courts-baron to present individual burgesses for the occupation of pieces of the waste; and paragraphs 14, 15, and 16, shew such presentments of the respondent in the years 1841, 1852, and 1855, respectively. The lease of those parcels was granted in 1861, and the respondent has occupied the land ever since, paying rent to the lord. It in effect gave him an estate for life. The lord, therefore, is estopped from disputing his title under the lease; and, as against the commoners, he has an indefeasible right by possession for more than twenty years. Is it competent for a political objector to intervene and say that the respondent's title could not have had a legal origin? or, can the respondent's title by possession for over thirty years be made worse by his being possessed of a lease? There is no instance of land so presented ever having reverted to the lord or to the commoners; for anything that appears, it remains in the presentee for ever, or at all events for life, which is sufficient to entitle him to a vote. (2)

Grantham, Q.C., in reply. The claim to vote here is rested on the right of the lord to grant the lease in question. *The Bishop of Chichester and Strodwick's Case* (3) shews that future burgesses or commoners cannot be affected by the unlawful acts of their predecessors.

DENMAN, J. I am of opinion that the respondent is entitled to judgment. Many points have been touched upon in the course of the argument which might give rise to some difficulty if the facts stated in the case did not dispose of them. It appears to me that

(1) 6 T. R. 741.

(2) See *Attorney General* v. *Tomline*, 5 Ch. D. 750.

(3) Godb. 326, p. 234.

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our decision really turns upon the effect of the statement in paragraph 10,—"At the courts-leet and courts-baron it has been the practice of the mayor and burgesses for one hundred years and upwards,"—which is equivalent to a statement that the practice has existed from time immemorial,—"to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, 'he to agree with the lord for the rent.' In all cases, the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed; such rents being very small sums, varying according to circumstances. *No duration of the holding was specified in such presentments;* but, upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the court-leet." No question of value arises: it must therefore be assumed, subject to the point of law, that there was sufficient value to give the respondent a vote. No duration of holding was specified. That I take to be equivalent to a statement that the leases enured according to the usual course of things in this borough, that is, for a period at least as long as the duration of the lessee's life. No question arises here as to what is to happen as to the personal representative. Salmon has held the land and paid rent from 1861. This, then, is made out, that he holds land of the necessary yearly value for a period at least during his natural life from the person in whom the freehold is vested. That entitles him to a vote for the county. The execution of the lease, upon the facts found, cannot give the respondent a less title than he would have had upon the mere statement of the custom. I think the appeal should be dismissed.

LINDLEY, J. I also am of opinion that the respondent is entitled to judgment. Only two questions arise here, first, has the respondent the necessary qualification?—secondly, is it of sufficient value? The qualification is franktenement. Has the respondent got that? Beyond doubt he has. He has a lease for lives from the lord of the manor, who is owner in fee of the land. He has therefore a freehold interest from a person who can give it

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to him. But it is insisted that the estate he takes is subject to certain rights of common. That might, indeed, affect its value; but the question of value is not raised here. We need not discuss the rights of the tenant as against the commoners. It is enough to say that his title is good as against the lord, and also as against the commoners to this extent, that they cannot dispossess or disturb him for the term of his life, for they have concurred in the grant. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard, for Jenkins & Evans, Cardigan.*

Solicitors for respondent: *Cookson, Wainwright, & Pennington.*

[END OF REGISTRATION CASES.]

CAMPBELL *v.* STRANGEWAYS.

Nov. 23.

Day—Fraction of—Keeping Dog without licence—Licence subsequently obtained on the same Day—30 Vict. c. 5, *ss.* 5, 8.

On the 21st of October, the respondent kept a dog without having in force a licence granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the Excise, and he took out a licence at a later hour on the same day.

Sect. 5 enacts that every licence shall commence on the day on which the same shall be granted.

An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he produced the licence granted on the 21st of October, and the charge was dismissed:—

Held, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent licence operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the Act before the licence existed.

CASE stated by a police magistrate, under 20 & 21 Vict. c. 43.

On the 21st of October, the appellant, an excise officer, called at the house of the respondent, at about 12.40 P.M., and there saw a dog, above the age of six months, kept by him. No licence for the dog was then in force. On the same day at 1.10 P.M. the respondent took out a licence authorizing him "to keep one dog . . . from the date hereof, until December the 31st, 1877."

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The appellant laid an information against him, which charged that "on the 21st of October, 1877," the respondent kept a dog without a licence. (1)

At the hearing of the information the respondent produced the licence. The magistrate being of opinion that the licence was an answer to the information, dismissed the charge.

The question was whether his decision was right.

Lockwood (*C. Bowen*, with him), for the appellant. The magistrate was wrong. In deciding the case the precise times at which the penalty was incurred and the licence granted ought to have been regarded: Chitty's Archbold's Practice, 12th ed. p. 164. Lord Mansfield said in *Combe* v. *Pitt* (2), that "though the law does not in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done; for it is not like a mathematical point which cannot be divided." So likewise, Patteson, J., in *Chick* v. *Smith* (3) said: "The good sense of the matter is, that where it is necessary to shew which was the first of two acts, the Court is at liberty to consider fractions of a day. The rule of law would be otherwise absurd." The licence may commence on the day, and yet only operate from the moment at which it was actually granted. When that time is ascertained to have been after the offence, then both a conviction and the licence would be consistent.

[LINDLEY, J. The licence authorizes the respondent to keep one dog "from" the date thereof. The form is wrong. It is not in accordance with the words of s. 5.

GROVE, J. The provision that the licence shall terminate "on" the 31st of December, no doubt means at the end of that

(1) 30 Vict. c. 5, imposes an excise duty in respect of dogs, and provides for the granting of licences to keep them. By s. 5, the licences to be taken out under this Act shall be in such form and shall be granted by such officers of Inland Revenue as the Commissioners of Inland Revenue shall direct; and every licence shall commence on the day on which the same shall be granted, and shall terminate on the thirty-first day of December following. By s. 8: If any person shall keep a dog without having in force a licence granted under this Act, authorizing him so to do .... he shall for every such offence forfeit the sum of five pounds.

(2) 3 Burr. 1434.

(3) 8 Dowl. 337 at p. 340.

day. But in strict grammatical construction, "on the 31st of December" would mean "when the 31st of December has arrived." And the word used should have been "with."]

The respondent seeks to avail himself of a general rule of law, but his case is within the exception to it, and if the Court might not here regard the part of the day at which the licence came into existence, the Act would be often violated with impunity.

GROVE, J. We are now satisfied that the decision of the magistrate was wrong, although much could be said in favour of it. Effect can only be given to the Act and to the language of sect. 8, by holding that the offence was actually committed on the date alleged, and could not be purged by the defendant taking out a licence at a later hour of the same day. *Chick* v. *Smith* (1) and the other cases cited explain where the law will distinguish the fractions of a day, viz., where it is necessary—not merely as was once said, for the "purposes of justice," which is a vague expression, but—for the purposes of the decision to shew which of two events first happened. Undoubtedly, the defendant did "keep a dog without having in force a licence granted under this Act authorizing him so to do" contrary to the terms of sect. 8. But can the operation of that section be modified or changed by the words used in s. 5, declaring that "every licence shall commence on the day on which the same shall be granted, and shall terminate on the 31st day of December following"? The object of s. 5 is that if a person does not take out a licence on the first day of the year, a licence afterwards taken out shall not cover the preceding part of that year; for example, if granted on the 1st of June it shall not run from the 1st of January; and the provision that the licence shall commence "on" the day does not necessarily mean that it shall begin at the first moment of the day, but that it shall not go further back than that day. Our judgment will in no wise contradict this provision, because we decide that the licence did commence on the day on which the same was granted. Suppose after this offence a valid conviction had been signed and sealed on the same day, that would have been a true and proper conviction at the time, and could not

(1) 8 Dowl. 337.

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have been overruled or altered by the defendant, on the same day but subsequently, taking out a licence, which could be rightly said to run back through the doctrine of relation to the beginning of the day, and so make the conviction wrong. If our construction of sect. 5 be correct, then we may regard the fractions of the day, for otherwise the events of it would be subsequently varied by the conduct of the parties on the day. We hold that the sections can be read in a manner not inconsistent with each other, that the respondent did "keep a dog without a licence," that the licence afterwards granted "on" the same day, commenced "at and from" the time when actually issued, and was no protection to him for the past offence, and that he was, therefore, liable.

LINDLEY, J. I have arrived at the same conclusion. At first I was rather inclined to take the view of the magistrate, partly because I thought a man might buy a dog at, say, 8 o'clock, A.M. and not take out a licence until 4 P.M. on the same day, and yet be convicted, although he may not have had the time or opportunity to have obtained a licence sooner after the purchase. But the answer perhaps would be that the words of s. 8 are not "have" but "keep" a dog, and that during the short interval of possession between the purchase and the time of taking out a licence he could not be said to "keep" the dog so as to bring himself within the terms of the enactment. The case, however, turns on the true construction of ss. 5 and 8. By s. 5, the form of the licence is left to the officers of Inland Revenue, and although they are not bound to adopt any particular form, yet it must not be inconsistent with the Act. But this licence is not inconsistent with it. Section 5 declaring that the licence shall commence on the day on which the same shall be granted, the licence primâ facie, would cover the whole day, because there would be no necessity for distinguishing one part of the day from the other. But when s. 5 has to be construed with s. 8, we may be compelled to split the day into parts, and I think that in this case we are compelled. The authorities cited shew that we may do so, and when, looking to the order of events, we find first, the offence committed, and then that the respondent got

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a licence after the offence, I think we should go too far were we to say that because the word "on" is used in s. 5, an offence committed on a day can be purged by obtaining a licence at a later period of the day. I agree with my Brother Grove, in thinking that we can properly construe "on" as "at and from," and therefore there will be no inconsistency. The legislature probably meant to prevent a man taking out a licence to cover previous defaults. I think the offence here was complete, and that the mere fact of taking out a subsequent licence did not affect it.

Decision reversed.

Solicitor for appellant: *The Solicitor to the Inland Revenue.*

SMITH *v.* WALTON.

Nov. 30.

Master and Servant—Goods damaged by Artificer—Delivery thereof to him as Wages—Payment otherwise than in Coin—Truck Act (1 & 2 *Wm.* 4, *c.* 37), *ss.* 3 & 9.

An artificer in a trade within the Truck Act (1 & 2 Wm. 4, c. 37), having, through negligent workmanship, damaged a piece of cloth, his employer delivered to him the damaged cloth instead of such wages earned as were equivalent to the value which, according to the assessment of the employer, the cloth would have had if undamaged:—

Held, that the employer had paid wages otherwise than in current coin, and was therefore liable to a penalty under sect. 9 of the Act.

CASE stated by justices under 20 & 21 Vict. c. 43.

On the 13th of June an information preferred by the appellant against the respondent under s. 9 of 1 & 2 Wm. 4, c. 37 (the Truck Act), charging that he, the respondent, on the 10th of March, 1877, then being the employer of the appellant, an artificer employed in the manufacture of cotton, unlawfully did, by the agency of one John Walton his servant, or book-keeper, pay to the appellant "certain wages then due and payable in respect of such employment by the respondent to the appellant, to wit 18*s.* 8½*d.*, otherwise than in the current coin of the realm, to wit in a piece of cotton-cloth, contrary to the provisions of the Act to prohibit the payment of wages in goods," was heard by the justices.

At the hearing it was proved and found:—That the respondent

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was a cotton manufacturer, and the appellant a power loom weaver in his employment.

That on the 28th of February, 1877, the appellant delivered, in the warehouse of the respondent, a piece of cotton-cloth which the appellant had woven in the respondent's shed. That day was the day up to and including which the week's wages of the weavers were reckoned, and called the making up day, and the piece of cloth was included in making up or calculating the wages of the appellant for that week. No complaint was made as to the weaving of the piece of cloth that day, as it was not examined by the respondent's manager until the following day, and it was not the practice of the respondent to examine the pieces of cloth delivered by the weavers at the time they were delivered by them in his warehouse.

On the following day, Thursday, the 1st of March, a complaint was made to the appellant by the respondent's son (Robert Walton), who managed the respondent's mill and had then seen the cloth; he said to the appellant that it would not do to let such like pieces as that pass—it was not worth twopence; but that, as the appellant was a new weaver, he would not like to discharge him, and he must mind for the future. That was all that was said at the time. The ground of complaint of the respondent's son Robert Walton was that the piece of cloth was damaged by the existence in it of what is known as a "float" at the side of the piece of cloth. A "float" is caused by the warp not being woven into the cloth, and the weft passing underneath the warp instead of being woven into the warp. The piece of cloth was produced in court. The "float" was caused by the negligence of the appellant. Friday, the 2nd of March, was pay day for that week, and on that day the appellant received his wages, including the full wages for the weaving of the damaged piece. No abatement in appellant's wages was made in respect of that piece.

On Saturday, the 3rd of March, the appellant delivered another piece of cloth in the warehouse that was woven in a different loom and was of a different class of cloth. On the 5th of March, the respondent's book-keeper, John Walton, complained to the appellant that there was a "float" in the middle of the last-mentioned piece of cloth, and that the appellant would have to have some-

thing deducted from his wages for the "float," and for the "float" in the first mentioned piece of cloth also, or that he would have to take the piece of cloth home. The appellant said that he would leave, meaning that he would leave at once the respondent's service, and the book-keeper said that he would not have to do so. On the Tuesday following, the 6th of March, the appellant again saw John Walton, respondent's book-keeper, and asked him what he was going to stop out of his wages for the piece, and he replied that he would have to take one of the pieces of cloth home; to this the appellant made no reply. On the 7th of March the appellant gave one week's notice of his intention to leave the respondent's service. That was the day for making up the wages for that week, and up to that time the appellant had earned 18*s.* 8½*d* as that week's wages. On Friday, the 9th of March, the appellant went to the respondent's office for his wages, and saw John Walton, the book-keeper, and asked him for his wages, but did not receive them. John Walton said that the appellant "would have to take the piece home, and there were no wages for him." The appellant said, if "there were no wages he would have the piece;" that was the piece produced in court. On the following Saturday, the 10th of March, in consequence of the recommendation of the Weavers' Union, the appellant went to the respondent's warehouse and again saw John Walton and asked for the piece, which he received and took away with him. The appellant did not receive anything that day in cash. The appellant left the respondent's employment on the 14th of March last in pursuance of the notice he had given; at that time the appellant would have earned as wages, if all his work had been properly done, 1*l.* 2*s.* 6½*d.* for the week then last past; and for the previous week 18*s.* 8½*d.*

The appellant retained the piece of damaged cloth, and on the 16th of March he again went for his wages and saw the respondent's manager, Robert Walton, and received from him 1*l.*; the sum of 2*s.* 6½*d.* was retained out of his wages last earned, because there was not sufficient owing to the appellant for the previous week's wages to pay for the damaged piece of cloth which the appellant had taken. That would be 18*s.* 8½*d.* for the first week's wages, and 2*s.* 6½*d.* deducted from the last week's wages, making together the sum of 1*l.* 1*s.* 3*d.*, the value of the piece of cloth.

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The appellant had, on the 14th of March, ascertained from the respondent's book-keeper that the value of the damaged piece was 1*l.* 1*s.* 3*d.*

Proceedings were afterwards taken in the County Court, and the wages due, less the actual amount of damage done, were paid in cash, and the cloth given up under an arrangement between the parties.

The justices were of opinion that the offence charged was not of the class of offences contemplated by the statute, and dismissed the information. The question for the opinion of the Court was whether that decision was right.

Cave, Q.C. (*R. S. Wright* with him), for the appellant. The respondent paid the wages in cloth, not coin. The material belonged to the respondent. The labour expended on it was that of the appellant.

[GROVE, J. Is not the transaction rather a forfeiture of the wages and a gift of the worthless goods?]

No. The wages were earned, and when payment was demanded the artificer was told that he would "*have* to take the piece of cloth home." It was not worthless. It must be admitted, although not distinctly stated in the case, that 1*l.* 1*s.* 3*d.* was the full value of a perfect piece of cloth. Nevertheless it is evident that the employer did not treat the wages as forfeited or the damaged piece as valueless, but paid him wages by means of it. This was an infringement of the Act 1 & 2 Wm. 4, c. 37, "to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm." Sect. 3 enacts "That the entire amount of the wages earned by, or payable to, any artificer in any of the trades hereinafter enumerated in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be, and is hereby declared to be, illegal, null, and void." The manufacture of "cotton" is one of the trades: s. 19. The exceptions are payment by banknotes, or by drafts to

bearer received with the consent of the artificer: s. 8; and certain stoppages for medical attendance, fuel, tools, and fodder for beast supplied under circumstances specified in s. 23. But stoppage of wages for damage to goods is not included. Sect. 9 imposes the penalty for contravention of the Act. So stringently has the legislature prohibited truck, that a special enactment was needed to enable county court judges to allow a set-off for damage against a claim for wages: 38 & 39 Vict. c. 90, s. 3. To constitute an offence against the Truck Act, it is not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman; the mere payment is enough. And the offence is not purged by a subsequent payment in money, whether made voluntarily or otherwise: *Wilson* v. *Cookson.* (1)

[GROVE, J. Suppose an artificer really preferred and elected to take payment in goods, not cash?]

The case would still be within the Act.

[LINDLEY, J. The men are protected against themselves.]

Yes. The evil intended to be remedied by the statute was "the giving by masters to their workmen in exchange for their labour, wholly or in part, things of *uncertain value,* instead of money, the value of which is *certain*": per Keating, J., *Archer* v. *James.* (2)

The respondent did not appear.

GROVE, J. I am rather sorry no argument was addressed to us from the other side. At first I had some doubt, for I thought the transaction might have been this, viz., that the employer had deducted the full value of the cloth, treating the artificer as having forfeited his whole wages, and then, deeming the cloth valueless, said: "You may keep it." It might be that the employer had no right to deduct the full value of the cloth, or to say the artificer had forfeited his wages to the full value. But I much doubt whether the delivering of the cloth to the artificer under such circumstances would be payment in kind within the meaning of the Act. Looking more closely into the case,

(1) 13 C. B. (N.S.) 496; 32 L. J. (M.C.) 177.

(2) 2 B. & S. 61, at p. 76; 31 L. J. (Q.B.) 153, at p. 159.

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however, the real transaction on the part of the master seems to have been that the full value was deducted, and that the retention by the artificer of the piece of cloth was to satisfy a certain amount of wages. From the facts stated, we find that the book-keeper on the 5th of March complained of the "float" in the second piece of cloth, and said that the appellant "would have to have something *deducted* from his wages for that float;" there, the employer uses the word "deducted." As, however, "something deducted" might be in the nature of a fine, that expression is not of itself conclusive; but there is the following passage, "*or* would have to take the piece of cloth home." The next day the appellant asked the book-keeper, "What he was going to *stop* out of his wages for the piece?" and he replied that he "Would have to take one of the pieces of cloth home;" and on the next pay day the appellant did not receive anything in cash. So, first, something was to be deducted; secondly, he would have to take one piece of cloth home. The appellant did take it home, and thus his wages were adjusted. Eventually 1*l.* was paid to him, and 2*s.* 6½*d.* was not paid him, but was retained to pay for the damaged piece of cloth which he had taken. To assess the value of the damaged cloth and pay him the balance, deducting the value of the damaged cloth assessed as a damaged piece, I should have been clearly of opinion was not within the Truck Act. But the respondent has deducted the whole value, and throughout the transaction the damaged piece is treated as part of the cash. The employer says, "You may deduct the whole value. I will pay you only the balance between that and your wages;" or "You may take the damaged piece home, and set that off at *my* valuation against *your* wages." I think that is within the very spirit and words of the Act, because it is assessing the value, whether more or less than the real value, of the damaged piece. It is, in effect, saying, "You shall take the whole of the damaged piece in part-payment of your wages." It was offered as part of his wages, and was taken by the artificer—although not indeed in a manner we should approve of, for he took it under advice of a trades union with a view to proceedings against his master. But we cannot consider that fact. If an artificer receives as and for wages anything in goods, save those excepted

under certain conditions, such mode of remuneration is prohibited. I think the decision of the magistrates should be reversed.

LINDLEY, J. I am of the same opinion. To understand the substance of this transaction it is necessary to look at the mode in which the two weeks' wages were adjusted. The appellant had earned at the end of one week 18*s.* 8½*d.*, and at the end of another 1*l.* 2*s.* 6½*d.*, in all 2*l.* 1*s.* 3*d.*, and when they settled the employers paid him actually 1*l.* in cash, and no more. That left a difference of 1*l.* 1*s.* 3½*d.* not paid. Now was that made up? The employer said, "I will not pay you that; I have paid you it in goods which you have spoilt, and which I value at 1*l.* 1*s.* 3*d.*;" so he squared accounts by deducting that amount, and thus paid the artificer in goods 1*l.* 1*s.* 3*d.*, and in cash 1*l.* If that is, in substance, the transaction, it is obviously within the Act. Or let it be looked at in another way; taking the second weeks' payment, the respondent paid him 1*l.*, and did not pay him 2*s.* 6½*d.*, assuming to exercise the right of set-off, and that, again, under the Act the employer had no right to do. So, whether there was a payment in goods, or a set-off, the respondent had infringed the Act of Parliament, and the decision of the magistrates must be reversed.

Decision reversed, without costs.

Solicitors for appellant: *H. Edmunds, for T. J. & W. Backhouse.*

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Dec. 7.

Ship and Shipping—Barges on Thames in Tow of Tug—"Worked or Navigated," 22 & 23 Vict. c. cxxxiii. (Watermen's and Lightermen's Amendment Act, 1859), s. lxvi., by-law 60—Thames Conservancy by-law 16.

22 & 23 Vict. c. cxxxiii: An Act for the Better Regulation of the Barge Owners and others connected with the Navigation of the River Thames between Teddington Lock and Lower Hope's Point, by s. lxvi. enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the Act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned.

Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the Act. Four men were in charge, but no one was on board either of the two last barges:—

Held, that the two barges were "worked or navigated" in contravention of the Act, which required a qualified person to be on board each barge to manage it, in case of separation or accident.

CASE stated by a police magistrate, under 20 & 21 Vict. c. 43.

The defendants, barge owners, were charged that they did, on the 25th of August last, unlawfully cause and permit two barges used for the carrying of goods and merchandise to be worked or navigated within the limits of the Act 22 & 23 Vict. c. cxxxiii., without having in charge of such craft a licensed lighterman or qualified apprentice, contrary to the 66th section.

It was proved that on the day aforesaid six barges, the property of the defendants, were being towed together near London Bridge by a steam-tug, and that on two of the six barges there was no such licensed lighterman or apprentice in charge.

On behalf of the defendants it was argued that the barges in tow of a steam-tug were not being "worked or navigated" within the meaning of the Act, so as to necessitate there being a licensed or qualified man in charge of each of them.

The magistrate convicted the defendants, and fined them twenty shillings and costs.

If the Court should be of opinion that the contention of the defendants was right, and that the barges should not have been held to have been "worked or navigated," then the conviction was to be quashed, otherwise to stand.

On the hearing of this appeal models were produced, shewing to the Court that the barges were attached by short tow-ropes stem

to stern, and in pairs, so that a file of three pair of barges followed the tug, and it was admitted that the two last barges had no person on board.

Sutton (*Webster* with him), for the appellants. The conviction was wrong. "Worked or navigated" in 22 & 23 Vict. c. cxxxiii. (1), s. lxvi., cannot refer to a vessel when being towed. The by-laws made for carrying into effect the purposes of the Act must not be inconsistent with the Thames Conservancy by-laws, and therefore the 60th by-law providing that every barge towed by a steam-boat shall have a licensed person in charge is bad, for it is inconsistent with the 16th by-law made by the conservators, which excepts barges towed by a steam-vessel, and is a guide to the construction of the Act. (2) These barges were lashed together so as to be practically united into a single craft, and one man on board would suffice for all six. The component parts of the craft thus formed could not be separately navigated.

[LINDLEY, J. The case finds that on two barges there was nobody in charge, does that mean on board?]

Yes. Nothing can be navigated unless it contains the motive power within it.

(1) 22 & 23 Vict. c. cxxxiii.: "An Act for the Better Regulation of the Watermen, Barge Owners, and others connected with the Navigation of the River Thames, between Teddington Lock and Lower Hope Point."

Sect. lxvi. provides that no barge, lighter, boat, or other like craft, for the carrying of goods, wares, or merchandise, shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed . . . mentioned; or an apprentice qualified . . . . and if any such craft, be navigated in contravention of this section, the owner thereof shall, in respect of such offence incur a penalty not exceeding 5*l*. . . . .

(2) By s. lxxx. the court of the company of watermen and lightermen are empowered to make by-laws for carrying into effect the purposes of the Act, so that the same by-laws be not inconsistent with . . . . any of the by-laws . . . . made by the Conservators of the River Thames. The 60th by-law of the company provides that every barge, lighter, or craft towed on the river by a steam-boat shall have one licensed lighterman, or licensed apprentice, at least, in charge thereof, to steer and navigate the same.

The 16th of the by-laws made by the Conservators of the River Thames, provides that "all barges, boats, lighters, and other like craft navigating the river shall, when under way, have at least one competent man constantly on board for the navigation and management thereof . . . . with the following exceptions: when being towed by a steam vessel . . . ."

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[GROVE, J. Then is not a boat towed by horses navigated?]

Men are needed on board such boats to steer, but these particular barges lashed together became mere baulks of timber, incapable of being navigated like separate vessels.

Bedford Pim, for the respondent.

[GROVE, J. We are both of opinion that in the case of a compound barge the term "in charge" would mean in charge of that article. But here the question is, whether, there being six barges, it was necessary to have a man on each.]

It was. The exigencies of navigation sometimes require the barges to be disconnected. As, for instance, where there is a fear of a collision, the tug is cast off and each barge set adrift separately, and then each must have a man on board to work or navigate it, or it would be a dangerous nuisance in the river and in peril of being sunk. [He was stopped.]

GROVE, J. The question is as to the construction of s. 66 of 22 & 23 Vict. c. cxxxiii., which cannot be controlled by by-laws. The by-laws might be inconsistent, and therefore bad, or partially inconsistent, not being fully equivalent to the section, and yet not be incapable of being performed, while they do not at all prevent the other requisites of the Act being complied with; for example, the first part of by-law 16, made by the Conservancy Board requiring barges to have "one competent man" on board. Now it may be that "one competent man" means primâ facie a man of sufficient age or knowledge of his vocation to be in charge of a barge, and that it would not be a compliance with the by-law to have a boy only on board. But that is, so far, not inconsistent with s. 66, for it would only add to that section that the man must be a licensed man. I do not say that the exception to by-law 16 is consistent with the Act. But the real point for us is, as I have said, the construction of s. 66. The question raised is whether it can be reasonably and properly said that, within the meaning of the section, the four persons who were "in charge" of the foremost were "in charge" of the two last barges which had nobody on board. I am of opinion that it cannot. If some arrangement or contrivance could be made enabling four men to govern six barges there might be reason for altering the Act, but it is only

for us to construe it. When we find that on two craft no one was, and no evidence that in case of accident a man could get from one to the other on sudden requirement, then they were not within the terms, and were not within the fair meaning and object of the statute, for there was no one in charge so as to have full control over the separate barges to be able to protect each barge from being sunk, or to prevent other objects in the river from being damaged. In a variety of cases the barges might be damaged by wind, or stream, or swamped, through having no man on board to use the proper materials, fenders, or poles for navigating. This brings me to the words "worked or navigated," which cannot be confined to the mere navigation of the tug itself, the drawing power, because if they were, then when a number of barges in file came to the sinuosities of the river, the tug might, on rounding a curve, go straight forward and the barges proceed on their former course without control. I think "worked or navigated" means the barge, boat, or craft itself to which the tug is applied. Suppose—instead of a broad river—a narrow canal, the barges in which were worked by horses. What is a steamer but an inanimate horse—something which gives motion to the barges behind? The words "worked or navigated" may be applicable both to the barges themselves as well as to the steamer. They are worked partly by the steamer, and partly by the impulsion given by those on board the barge. Suppose a barge became detached, it could not then be said to be "worked or navigated" from the tug. How is it to be managed if nobody is on board? It becomes a helpless log. To give full effect to the Act we must say that each barge must be "worked or navigated," because otherwise each might, on occasion, follow an independent course, and unless we so construe the words we do not give effect to the Act or to the words "worked or navigated." Whether if two barges were so united as to substantially form one craft, a man in charge of that composite vessel would be "in charge" of each part, I do not decide, for such was not the fact in the present case, although even then perhaps a man should be on each. I think the Act was infringed by there not being a man on each of these two barges, each having a separate and independent course in part, and that therefore the magistrate was right.

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LINDLEY, J. I am of the same opinion. The question really involves two:—whether each of those barges was being "worked or navigated" within the true meaning of s. 66 of the Act, and if it was, whether there was in charge of each craft a licensed waterman or duly qualified person. Looking at the by-laws to see in what sense those who drew them understood it, it is quite clear that a barge being towed is being "worked and navigated," although that is not conclusive. By the words "worked or navigated," I understand a state of moving forward, whether caused by oars, or horses, or steamer. I have no hesitation in holding that these barges being towed were "worked or navigated." The second point, on which I had most doubt, is whether, assuming that to be so, s. 66 has not been complied with. Here were six barges and four men in charge. I thought at first that it might be said that the four men were in charge of each of the six barges; and in some circumstances I can conceive that being so, as in the case of consolidated barges, but looking at the Act more closely we find that there is to be "in charge" of each craft (it does not say "on board," so there may be a mode of being in charge without being on board) a licensed person. "In charge" means in charge of each craft. Was that so here? I think not. The test is this. How was each to be worked—not if everything went right, but—if everything went wrong? In such case it is clear there would not be a man in charge of each. So I think the Act was not complied with. Mr. Sutton referred to the 16th of the Thames Conservancy by-laws, but it cannot override the Act nor be inconsistent with it. It provides that all barges shall have one competent man on board except when being towed by a steam-vessel. "When being towed by a steam-vessel," are the widest terms, so that any number of barges might be towed without a man on board, which is quite inconsistent with the Act of Parliament. But I pass that by. We are construing the statute, and on that I think the magistrate came to a right decision.

Conviction affirmed.

Solicitor for appellant: *Lowless.*

Solicitor for respondent: *William Edwin.*

STEEL *v.* LESTER AND LILEE. 1877 *Dec.* 7.

Negligence—Ship—Liability of "Managing Owner" for negligence of Captain trading independently and rendering a Share of Profits to Owner—Merchant Shipping Act, 1875 (38 & 39 *Vict. c.* 88, *s.* 4, *sub-s.* 5).

A sloop was navigated under a verbal agreement between A., the "managing owner," registered according to the Merchant Shipping Act, 1875, and B., the captain, by which, on condition that A. should have one-third of the net profits, accounts of which were to be rendered to him by B. from time to time, B. was at liberty to go to any port, and take or refuse any cargo he chose, and was also to hire and pay the crew and supply the stores, A. having no control over the vessel. While discharging cargo under a charter made by B "for and on behalf of the owner," the vessel, through the negligence of B., broke loose from her moorings and damaged the wharf of the plaintiff, who brought an action against A. and B:—

Held, that the agreement did not amount to a demise of the vessel and, whatever was the precise relationship thereby created between the defendants inter se, A. was responsible to the public for the negligence of B., and, therefore, both were liable in the action.

CASE stated on appeal from the Lincolnshire county court.

This action was brought against the defendant Lester as the owner, and the defendant Lilee as the master of a sloop, for damage to the plaintiff's wharf by the sloop breaking loose from her moorings under circumstances, which in the opinion of the county court judge shewed negligence by the defendant Lilee in the management of the vessel. The material facts proved were as follows:—The defendant Lester, who was a merchant living and carrying on business at Stoke-upon-Trent, in Staffordshire, purchased in May, 1873, the sloop *Anne*, which was duly transferred to him and registered in his own name as the owner, he was afterwards registered as the "managing owner," under the provisions of the Merchant Shipping Act, 1875 (38 & 39 Vict. c. 88, s. 4, sub-s. 5). For about three months after the defendant Lester purchased the vessel he traded with her on his own account, employing the defendant Lilee as skipper, paying him standing wages; at the end of three months from his purchase of the sloop he agreed verbally with the defendant Lilee that he should take the ship wherever he chose on condition that he (Lester) should have a third of the net profits. Lilee was to be at liberty

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to go to any port and to take any cargo he chose, and to refuse any cargo, he was also to engage the men, and Lester had no control over the vessel. Lilee was to render to Lester accounts of his profits from time to time, and this state of things continued till after the collision—Lester selling the vessel in October, 1876. In the month of March, 1876, the defendant Lilee entered into a charterparty, expressed to be made "between Captain Lilee, master, for and on behalf of the owner" of the ship, and the charterers. The sloop arrived at Spalding, the port therein named, in due course, and after partially discharging the cargo remained several days at the port under the charterparty, and whilst so remaining the damage was occasioned to the plaintiff's wharf by reason of the negligence of the defendant Lilee.

The defendant Lester was not consulted by the defendant Lilee as to the contract for taking the cargo, and never saw or heard of the charterparty till after the commencement of the action; he was not present at the port of Spalding when the vessel arrived there, or at any time thereafter during the stay at the port, and he did not take any part in the management of the vessel during the voyage to or whilst she remained at the said port. The men employed in navigating the vessel on such voyage (as on all previous voyages during the existence of the agreement between the two defendants) were hired and paid by the defendant Lilee, who found all stores required for the ship and paid to the defendant Lester one-third of the profit realized by the voyage. The county court judge gave judgment against both defendants for the amount of the damage proved. The defendant Lester only appealed, and the question was whether he was legally liable for the negligence of the defendant Lilee in the management of the ship.

F. T. Streeten, for the appellant. The owner and captain were not partners in the ship. Mere perception of profits may be evidence of a partnership, but any primâ facie presumption raised from the receipt of profits is rebutted by the terms of the agreement shewing that there was no agency between the parties: *Cox* v. *Hickman* (1); *Bullen* v. *Sharp*. (2) The whole agreement must

(1) 8 H. L. C. 268; 30 L. J. (C.P.) 125. (2) Law Rep. 1 C. P. 86.

be considered: *Ross* v. *Parkyns.* (1) As Jessel, M.R., said of the contract in that case, so here, "There is not a word about partnership in it from beginning to end." The reservation of profits was only a mode of payment for the use of the vessel. Lilee was the trader, Lester having no control.

[LINDLEY, J., cited *Pooley* v. *Driver.* (2)]

Secondly, there was no relationship of master and servant, employer and employed, or principal and agent, so as to make the superior liable for the negligence of the subordinate. The captain engaged and paid the seamen, and if they were incompetent Lester could not have dismissed them. They were the servants of Lilee only: *Milligan* v. *Wedge* (3); *Reedie* v. *London and North Western Ry. Co.* (4) In *Fraser* v. *Marsh* (5), it was held that the registered owner of a ship, having chartered her to the captain at a rent for a certain number of voyages, was not liable for stores furnished to the ship by the order of the charterer during the charterparty. Lord Ellenborough, C.J., said, "The Register Acts were passed diverso intuitu; but to say that the registered owner, who divests himself by the charterparty of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by order of the captain during that time, would be pushing the effect of those Acts much too far," and that case in principle applies, for although there may have been here no actual demise of the vessel there was a letting and hiring to the captain with absolute control.

[GROVE, J., cited *Fowler* v *Lock.* (6)]

There the plaintiff obtained from the defendant a horse and cab to drive on the usual terms, viz. that the driver should daily hand over a certain sum of the earnings and retain the remainder, and the defendant had no control over him. The Court of Common Pleas was divided in opinion on the question whether the relation between the parties was that of bailor and bailee or master and servant. In *Venables* v. *Smith* (7) where a cab was driven under a

(1) Law Rep. 20 Eq. 331.
(2) 5 Ch. D. 458.
(3) 12 Ad. & E. 737.
(4) 4 Ex. 244.
(5) 13 East. 238.
(6) Law Rep. 7 C. P. 272; Law Rep. 10 C. P. 90.
(7) 2 Q. B. D. 279.

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similar agreement, the Queen's Bench Division held the owner responsible to a person injured by the negligence of the driver; but so decided because of the Hackney Carriage Acts, which, as Cockburn, C.J., says, were "expressly passed for the protection of the public."

Finlay, for the respondent. It is immaterial whether the owner and captain were partners or master and servant. There was some evidence of one or the other relationship, and either would suffice to entitle the plaintiff to recover against both defendants. The present question is, was there any evidence for a jury. The judge acted as jury. The Merchant Shipping Act, 1875 (38 & 39 Vict. c. 88), s. 4, requires that "the owner of every British ship shall from time to time register . . . the name of the managing owner, and if there be no managing owner, then of the person to whom the management of the ship is intrusted by and on behalf of the owner." Lester registered himself as "managing owner" and not Lilee. But if the contention for the appellant were correct, Lilee would have been registered. The action is not between owner and captain inter se, but by one of the public against them. Lester is responsible to the public, as the defendant was held to be in *Venables* v. *Smith* (1), which is an authority for the plaintiff. He would have been punishable for offences under the Act.

[GROVE, J.:—Then the finding in the case that Lester had no control over the vessel seems contradictory.

LINDLEY, J.:—He had control over the master not over the ship.]

And held himself out to the world as the "managing owner" by means of the register. [He was stopped.]

Streeten, in reply. The Act was passed to "make provision for giving further powers to the Board of Trade for stopping unseaworthy ships" as the title states. The scope of it is to protect sailors, and not the public generally.

GROVE, J. I think the judgment below was right. The question is whether the relation of master and servant existed between the defendants, or, to treat the matter more broadly, Lester

(1) 2 Q. B. D. 279.

remained liable for the acts of Lilee, or whether Lester had divested himself of all control, and had parted with the ship, either absolutely or for a term, and was therefore not in any way responsible for the management. The case which at first seemed most adverse to the decision of the county court judge was *Fraser* v. *Marsh* (1), where a vessel had been demised by the owner to the captain, and it was held that by parting with the ship the owner had divested himself of all control, and that the ordinary relation of owner and captain did not exist. But there was in that case an absolute demise and disposition of the vessel for the time, and further, there was not at that date the necessity for registering some one as the "managing owner" under the Merchant Shipping Act, 1875, which has since been passed, and creates a relation to the public in order that some person shall be responsible for the vessel being properly fitted and conducted, and that injury to the public may be guarded against. Two distinctions between the present case and *Fraser* v. *Marsh* (1) exist. First, that in *Fraser* v. *Marsh* (1) there was an absolute demise, while here, as the county court judge has found, there was no demise, and secondly (for I draw the same inference from the facts that he did) that there was not an absolute parting with this vessel which would sever the control, but that Lester retained control through the captain, and still remained responsible to the public. (2) Another case cited was *Fowler* v. *Lock*. (3) The distinction there is manifest. That action was brought by a cabman against a cab owner for supplying him with an unfit horse. The parties had not the ordinary relations of master and servant in one sense of the term; the driver used the cab at his pleasure during the day, and paid the owner a certain sum per diem for it. A majority of this Court held that, as between the driver and proprietor, the relations were not those of master and servant but of bailor and bailee, and that the proprietor was responsible to the driver, and a verdict for the plaintiff was upheld. The case went to the Exchequer Chamber,

(1) 13 East, 238.

(2) Also in *Fraser* v. *Marsh* the question was as to the liability of the registered owner on contracts entered into by the captain; not whether he was responsible for the captain's negligence.

(3) Law Rep. 7 C. P. 272; Law Rep. 10 C. P. 90.

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where no express decision was pronounced, but the Court sent the case down to a new trial on the question as to who took the risk of the adventure. Again the verdict was for the plaintiff, and came back to the Exchequer Chamber, and they declined to disturb it. If the present action had been by Lilee against Lester, then *Fowler* v. *Lock* (1) would have had strong application. But it is not so, it is an action by one of the public against both of them. In *Fowler* v. *Lock* (1), the Court did not in any way decide whether the relations of master and servant, although not existing between the two parties themselves, might exist as regards the public, a question previously determined by *Powles* v. *Hider*. (2) The action in *Venables* v. *Smith* (3), was not, as in *Fowler* v. *Lock* (1), by cabdriver against proprietor, but by a third person against the proprietor for bad driving. The Queen's Bench Division apparently assented to *Fowler* v. *Lock* (1) (which was not, however, to my mind applicable) and held that the driver was, quoad the plaintiff, the servant of the defendant, and was acting within the scope of his employment at the time the accident occurred, so as to make the defendant liable for the consequences thereof. Therefore *Venables* v. *Smith* (3) is, so far as it goes, in favour of the decision below. There are possible distinctions which might be taken, but it cannot be cited as an authority to the contrary. On first reading the case I was struck by a passage in which it is stated that Lester had no control over the vessel, and I thought that afforded an argument for the appellant, because it shewed that Lester had parted with all control, and had therefore put himself in the position of the owner in *Fraser* v. *Marsh* (4). True it is that in selecting the port and cargo Lester had no control, and that is so in nearly all voyages; but the statement in the case is capable of a full interpretation, viz., that Lester had no control as to the ports and cargoes, and yet remained responsible owner, proprietor, and manager of the vessel, as regarded the general public; and this is founded on two important matters, first, the Merchant Shipping Act, requiring the managing owner to be registered, or if there be no managing owner, that somebody

(1) Law Rep. 7 C. P. 272; Law Rep. 10 C. P. 90.
(2) 6 E. & B. 207; 25 L. J. (Q.B.) 331.
(3) 2 Q. B. D. 279.
(4) 13 East, 238.

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must be registered as such. Lester was registered as managing owner, and therefore he did not give up responsibility under this Act, and, as I think, his general responsibility to the public for damage done by the ship. He might have done so. If he had demised the ship so as to cease to be managing owner he might have registered Lilee, and then the case would have been different. But Lester did not do this. He by his own act remained managing owner, and therefore that was evidence on which the county court judge would reasonably conclude that he continued responsible to the public. Secondly he never gave up an interest in the adventure, but continued to have a joint interest to the extent of one-third of the profits. It is unnecessary to decide whether that rendered him in every respect a partner, but it seems additional evidence in support of the decision, because he was in some sense a partner by retaining a share of the profits, and would suffer or benefit by the failure or success of the adventures. I think there was fair evidence to support the county court judge's decision.

LINDLEY, J. I am of the same opinion. The question is whether on the facts stated in this case Lester is liable for the negligence of Lilee. I think that he is. The facts are that for about three months after the defendant Lester had bought this ship, he traded with it on his own account, employing Lilee as skipper at standing wages, before the passing of the Merchant Shipping Act, 1873. That arrangement was altered, and the question turns on the true effect of the alteration. I will first consider what it was. It was this, that instead of Lilee being employed at standing wages, the defendant Lester, still remaining owner, allowed Lilee, who was master, to take the management of the ship on the terms that Lilee should pay Lester one-third of the profits. What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee for his services—the owner

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paying him a share of profits instead of fixed wages, and retaining control over the master, but leaving the master to choose his ports and men; or it was this, viz., that the defendant Lester, still remaining owner, became partner with the master for the adventure, sharing the profits with him. I rather think that the latter is the true view. But in either view the result is that the sloop was managed by Lilee for the joint benefit of himself and the owner. That is a consequence from which there is no escape. The true conclusion on the facts is that Lilee was either the partner or agent of the owner, and if partner he was still agent of the owner for the management of the vessel. I do not think the agreement between them amounted to a demise of the ship, so as to render the master solely responsible, and I regard the case independently of the Merchant Shipping Act, 1875, which came into operation two years after the altered arrangement, yet evidently Lester did not regard Lilee as the person to be registered under it. It is quite clear on the construction of its provisions that the object of the Act was to protect the people on board vessels, and so the fact of registration is not conclusive; but it is a cogent circumstance to shew that there was no intention on the part of Lester to alter the relations, for otherwise he would have registered Lilee. He did not, but registered himself. Moreover, without laying too much stress on a word, we find Lilee entered into the charterparty "for the owner," which is strong evidence in favour of the view we take.

Judgment affirmed.

Solicitors for appellant: *Wedlake & Co., for Keary & Marshall.*
Solicitors for respondent: *Routh & Stacey.*

BRADBURN *v.* FOLEY.

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Feb. 1.

Landlord and Tenant—Custom of the Country as to Seeds, Tillages, &c.

Primâ facie the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm.

Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them; yet an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, cannot be supported.

SPECIAL CASE, on appeal from the county court of Worcestershire holden at Stourbridge, stated pursuant to Order XXIX of the County Court Orders of 1875 :—

The action was brought to recover 45*l.* 17*s.* 1*d.*, the balance alleged to be due from the defendant to the plaintiff as trustee of the estate and effects of E. J. Davies, a liquidating debtor, upon the following particulars of claim, so far as they are material to this case :—

1877. March 25. To amount of seed bills for seeds sown on farm by liquidating debtor .	£35	8	5
Sowing and harrowing 46 acres, 3 roods, and 14 perches, at 1*s.* per acre	2	7	0
To amount due to the trustee for acts of husbandry, tillages, &c., to the land by the debtor	69	12	0

1. On the 25th of March, 1873, Davies became tenant from year to year to the defendant, and an agreement dated the 16th of May, 1873, was subsequently signed, which agreement formed part of the case. When Davies entered upon the farm he took to and paid for the seeds, acts of husbandry, and tillages, &c., to the then outgoing tenant Thomas Wilson, and he did this under and by virtue of the terms of the agreement. (1)

(1) The agreement contained the following stipulation,—"The tenant to pay and compensate the said Thomas Wilson, as outgoing tenant (in exoneration of the landlord), for the ploughing and cleaning of all the turnips, fallows, and land sown with rye for sheep keep, and all the seeds, also half the crop of wheat, and also the swedes and other turnips not con-

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2. On the 29th of September, 1876, notice to quit the tenancy on the 25th of March, 1877, was given by Davies to the defendant.

3. On the 11th of October, 1876, Davies filed his petition for liquidation in pursuance of the Bankruptcy Act, 1869, and on the 27th the plaintiff was duly appointed trustee under the liquidation. Shortly after the plaintiff's appointment as trustee the defendant caused the plaintiff to be served with a notice under the Bankruptcy Act to disclaim or elect to continue the tenancy for the remainder of the term ; and on the 29th of November, 1876, the plaintiff as such trustee elected to continue. On the 25th of March, 1877, a new tenant, one James Timmons, took and entered upon the farm by agreement with the defendant, and still is in possession of the same.

4. No agreement was entered into or valuation made between Timmons as incoming tenant and the plaintiff as outgoing tenant, and, although the plaintiff requested Timmons to take to the seeds, acts of husbandry, and tillages, he refused to do so; and thereupon the plaintiff requested the defendant as landlord to consent to have a valuation of the seeds, acts of husbandry, and tillages, &c., and to pay the amount of such valuation to the plaintiff; but he also refused to do so, and absolutely denied his liability.

5. It was agreed on both sides that, if the judge found for the plaintiff, the value of the seeds, acts of husbandry, and tillages, &c., should be settled by valuation in the usual way. It was also admitted on both sides that the plaintiff was entitled to be paid for the said seeds, acts of husbandry, tillages, &c., by either

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sumed, and also for all unconsumed hay, straw, and fodder; the tenant to consume and spend upon the premises all hay, straw (except such straw as shall be sold to the landlord as before mentioned), fodder, dung, turnips, or other green crops, manure, and compost to grow or be produced thereupon, and to have the liberty of selling all such produce unconsumed at the determination of the tenancy (except straw and barley in the straw required to be purchased by the landlord as aforesaid, and except manure, which shall be left for the landlord free of charge) to the succeeding or incoming tenant, to be consumed on the premises, at a consuming price; and, if no incoming tenant, the same shall be sold to the landlord at a consuming price, which price shall be settled between him and the tenant by two indifferent persons, one to be nominated by each party, or by their umpire, in case of disagreement," &c.

the defendant as landlord or by Timmons as incoming tenant. The question therefore for the judge's decision was from whom was the plaintiff entitled to recover the value of the said seeds, &c., whether from the defendant as his landlord or from Timmons as incoming tenant.

It was contended for the plaintiff that there was an implied contract between the defendant and Davies that at the termination of the tenancy the defendant would pay Davies for the seeds, acts of husbandry, and tillages, &c., and therefore that the plaintiff as trustee was entitled under such contract to recover the value of the same. It was also contended for the plaintiff that such implied contract arose from the agreement of the 16th of May, 1873, and also by the well-known custom of the country. Evidence was given on the part of the plaintiff that the custom of the country was for the landlord to pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., unless there was an agreement between the outgoing and incoming tenants that the incoming tenant should pay for the same.

For the defendant it was contended that he was not liable, and that by the custom of the country, when there was an incoming tenant who entered on the farm at the expiration of the tenancy of the outgoing tenant, he and not the landlord became liable to pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c. Evidence was thereupon given on behalf of the defendant that such custom existed, and that the custom was that the incoming tenant should pay the outgoing tenant for the seeds, acts of husbandry, tillages, &c., and that the landlord was only liable when there was no incoming tenant.

By way of reply it was contended that no such custom as that set up by the defendant could in fact exist, and that such custom was unreasonable and bad.

The learned judge entered a verdict generally for the defendant upon the facts and evidence before him. He found that, by the custom of the country, the incoming tenant and not the landlord was liable to pay for the seeds, acts of husbandry, and tillages.

The questions for the opinion of the Court were,—1. Whether such a custom as that set up by the defendant can in fact exist,—2. Whether, if such a custom can in fact exist, it is a good

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custom,—3. Whether upon the facts stated the landlord or the incoming tenant is liable to the plaintiff for the seeds, acts of husbandry, and tillages, &c.

If the Court should be of opinion that the first two questions should be answered in the affirmative, and that the incoming tenant is liable, the judgment to stand. If either of the first two questions be answered in the negative, or if the Court should be of opinion that the landlord and not the incoming tenant is liable, the verdict of the county court judge was to be set aside and a verdict entered generally for the plaintiff, subject to a valuation.

Jelf, for the plaintiff. Custom is something which adds an implied term to an already existing agreement: per Parke, B., in *Hutton* v. *Warren*. (1) The case states that there was no agreement between the outgoing and the incoming tenant: there being no privity of contract therefore between them, the incoming tenant cannot be liable to the outgoing tenant for the tillages; consequently the landlord must be, for it is conceded that the tillages must be paid for by some one. Under the terms of the agreement of the 16th of May, 1873, under which Davies took the farm, he paid the then outgoing tenant for the tillages expressly, as the agreement recites, "in exoneration of the landlord." It was clearly contemplated then that the landlord was the person who was primâ facie liable according to the custom to pay the outgoing tenant for the tillages at the expiration of his tenancy, in default of any agreement between the outgoing and incoming tenants. And this is the established practice. It is so clearly laid down by Dallas, C.J., in *Dalby* v. *Hirst*. (2) "We are satisfied," says that learned judge (3), "there was no good ground for contending before the jury that the custom, or rather usage, was unreasonable. It affords the strongest encouragement to good husbandry of farms; it is beneficial to landlords and tenants also; the land of the former receiving a lasting benefit from the labour and expense bestowed by the tenant, on payment of a reasonable compensation; and the latter being thereby encouraged to pursue a course of good husbandry by the assurance he has that, if his

(1) 1 M. & W. 466, at p. 475.
(2) 1 Br. & B. 224.
(3) At p. 236.

continuance on the farm should not enable him to reap the full benefit of what he has done, he will have a right to call upon his landlord for proportionate compensation." The principle was admitted and acted upon in *Boraston* v. *Green* (1), *Davis* v. *Connop* (2), *Hutton* v. *Warren* (3), *Faviell* v. *Gaskoin* (4), *Codd* v. *Brown* (5), and *Stafford* v. *Gardner* (6); in which last-mentioned case the reason of the thing is very clearly stated by Willes, J. The questions are not very accurately put in the case: but the evident meaning is that the judge finds that the custom set up by the defendant exists in point of fact, if the Court should be of opinion that it can be a legal one.

J. D. S. Sim, contrà. The judge has undoubtedly found the custom of the country to be that the incoming tenant, and not the landlord, is liable to pay for the seeds, acts of husbandry, and tillages. The only question therefore is, as stated, whether that custom is a good one in point of law. It is neither unreasonable nor inconsistent with any agreement between the parties. It may be that, if there is no incoming tenant, the liability is primâ facie cast upon the landlord. In *Faviell* v. *Gaskoin* (4) this question seems to have been anticipated by Parke, B., when he says (7), "I think that if there be no incoming tenant, the landlord is the person who, by the custom of the country, is bound to pay the outgoing tenant." But, he goes on to say, "by the custom of the country, when an incoming tenant takes possession, there is a contract implied upon his part, though primâ facie the contract is with the landlord." In *Codd* v. *Brown* (5) it was left to the jury as a question of fact. If the tenant enters, he must be assumed to have entered upon an implied understanding that, having taken to the tillages, he is to pay for that of which he takes the benefit.

[LINDLEY, J. It certainly seems to me to be an unreasonable custom which would throw upon the outgoing tenant a person whom he does not know and with whom he has not contracted. Another element of unreasonableness would seem to be, that

(1) 16 East, 71.
(2) 1 Price, 53.
(3) 1 M. & W. 466.
(4) 7 Ex. 273; 21 L. J. (Ex.) 85.
(5) 15 L. T. 536.
(6) Law Rep. 7 C. P. 242.
(7) 7 Ex. at p. 280.

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the landlord may maintain trover, but the incoming tenant cannot.]

The custom here affirmed, if good, will avoid circuity of action. *Beaty* v. *Gibbons* (1) and *Muncey* v. *Dennis* (2) were also cited.

Jelf, was not called upon to reply.

Cur. adv. vult.

Feb. 1. The judgment of the Court (Lindley and Lopes, JJ.) was delivered by

LINDLEY, J. It appears to us that, if the custom found to exist in this case can be supported in point of law, there is nothing in the lease under which the plaintiff held inconsistent with the custom, so as to exclude its application to him when his tenancy determined. It is very true that, when he went in, he agreed to pay the outgoing tenant's valuation, "in exoneration of the landlord:" but there is no provision in the lease to the effect that the landlord should compensate the plaintiff on his going out; and, apart from custom, no obligation so to do can be implied. The expression "in exoneration of the landlord" shews that the landlord was (or might be alleged to be) liable to compensate the plaintiff's immediate predecessor in the occupation of the farm: but, whether such liability was by reason of some custom or some contract, is not stated, and is not known to us; and, even if it were by reason of some supposed custom, the existence of such custom is inconsistent with the custom found in fact to exist.

The custom here found to exist in point of fact is to the effect that the incoming tenant, if there be one, is the only person liable to compensate the outgoing tenant: the custom as found exempts the landlord from liability altogether. Such a custom will be found, on examination, to involve the following consequences,—1. That the outgoing tenant has imposed upon him for his sole and exclusive debtor a person in whose selection he has no choice, and with whom he has made no contract at all,—2. That the incoming tenant has to make compensation to the outgoing tenant, irrespectively of the purposes for which he (the incoming tenant) may want the land, and whatever the terms between him and his landlord may be, and whether the incoming tenant takes the land

(1) 16 East, 116. (2) 1 H. & N. 216; 26 L. J. (Ex.) 66.

for a week, a month, a year, or a long term,—3. That the outgoing tenant can make no arrangement with his landlord as to his valuation, unless the incoming tenant is party to it and assents to it,—4. That, in the event of a letting and underletting, it is (on the custom as stated) uncertain who is to pay, viz. the immediate lessee from the landlord, or the ultimate tenant who takes possession,—5. That such a custom would lead any prudent tenant to run his farm out as much as by law he could, and to leave as little as possible for the incoming tenant to pay for.

A custom having such consequences as these appears to us so unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants, as to be incapable of being supported in point of law. The argument that it is to the interest of the landlord to secure a solvent tenant, and that consequently the outgoing tenant runs practically little or no risk, does not meet all the grounds of unreasonableness above pointed out. Indeed, it does not adequately meet any of them; for, it would be to the interest of an unscrupulous landlord to put in an insolvent man as tenant for a short time, so as to avoid having to pay the outgoing tenant himself, and yet to obtain possession before the poverty of the new tenant could be productive of injury.

The reasonableness or unreasonableness of a custom is a question of law for the Court, see *Tyson* v. *Smith* (1), and not a question of fact for the jury: and the principles applicable to such questions will be found in Com. Dig. *Copyhold* (S.), and *Tyson* v. *Smith* (1); and on these principles we proceed.

It may indeed be said that the custom here condemned is that which prevails in practice all over England; it being well known that, as a matter of fact the outgoing and incoming tenants usually settle questions of valuation between themselves, without referring to the landlord. This is, no doubt, true: but, if the practice is examined, it will be found to be based entirely on the principle that the landlord is liable by custom to the outgoing tenant, and that the incoming tenant is not liable to the outgoing tenant, where there is no contract express or tacit between them: see *Faviell* v. *Gaskoin* (2); *Stafford* v. *Gardner* (3); *Codd* v. *Brown.* (4)

(1) 9 A. & E. 406, at p. 421.
(2) 7 Ex. 273; 21 L. J. (Ex.) 85.
(3) Law Rep. 7 C. P. 242.
(4) 15 L. T. 536.

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The custom here found to exist is totally different: it exonerates the landlord from all liability, and imposes a liability on the incoming tenant to the outgoing tenant, even in the absence of any contract express or tacit between them. There is no inconsistency, therefore, in condemning the custom and upholding the practice which is based upon a custom wholly opposed to that with which we have to deal.

Holding, as we do, that the custom found to exist in point of fact cannot be supported in point of law, we set aside the verdict of the county court judge, and direct a verdict to be entered for the plaintiff, subject to a valuation. The defendant must pay the costs of the action and of this appeal.

Rule accordingly.

Solicitors for plaintiff: *Walker, Son, & Field, for C. W. Collis, Stourbridge.*

Solicitors for defendant: *Gregory, Rowcliffes, & Co., for Barnard & King, Stourbridge.*

March 2.

HINDHAUGH *v.* BLAKEY.

Bill of Exchange—Acceptance—1 & 2 *Geo.* 4, *c.* 78, *s.* 2—19 & 20 *Vict. c.* 97, *s.* 6.

Since the passing of the statute 19 & 20 Vict. c. 97, s. 6, simply writing the name of the drawee across the face of a bill of exchange does not constitute a valid acceptance; there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as acceptor.

APPEAL from a decision of the County Court of Northumberland holden at Newcastle.

1. On the 14th of September, 1877, the plaintiff entered a plaint in the Newcastle county court against the defendant to recover 20*l.* 18*s.* 8*d.* The particulars of claim were as follows:—

"Mr. George B. Blakey, Golden Lion Hotel, South Shields, to Robert Hindhaugh.

"1876. Oct. 6. To amount of your acceptance due this day	£20	0	0
"1877. Sept. 12. To interest from Oct. 6, 1876, to Sept. 12, 1877, 341 days, at 5 per cent. per annum .		18	8
	£20	18	8

2. On the hearing of the summons, the plaintiff produced the bill of exchange, of which the following is a copy:—

"£20 0 0 1876. July 3rd, Newcastle-on-Tyne.

"Three months after date pay to my order the sum of twenty pounds, value received.

Robert Hindhaugh."

"Mr. Geo. B. Blakey,
Golden Lion Hotel, South Shields."

George B. Blakey.

3. The plaintiff proved that he saw the defendant sign the bill by writing his name across it, that the bill was given for value, and that the sum of 20*l.* 18*s.* 8*d.* was due for principal and interest.

The defendant's solicitor then contended that the bill was not sufficiently accepted, according to 19 & 20 Vict. c. 97, s. 6, and that the plaintiff was not entitled to recover in consequence thereof.

The judge decided that the bill was not accepted within the meaning of 19 & 20 Vict. c. 97, s. 6, owing to the absence thereon of the word "accepted," and gave judgment for the defendant, with costs. (1)

The question for the opinion of the Court is, whether the bill is sufficiently accepted by the defendant by his writing his name across the bill, notwithstanding the omission of the word "accepted." If the Court should be of opinion that the ruling of the judge was wrong in point of law, the judgment to be entered for the plaintiff. If otherwise, the judgment to stand.

R. E. Webster, for the plaintiff. The law upon this subject is thus summed up in Byles on Bills, 12th ed. 190, 191,—"The 1 & 2 Geo. 4, c. 78, s. 2, enacted that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such

(1) A copy of the judge's notes was appended to the case, as follows:—

"25 Oct. 1877. *Hindhaugh* v. *Blakey*. 20*l.* 18*s.* 8*d.* Acceptance on bill of exchange.

"The plaintiff examined. Bill produced; consideration stated.

"Cross-examined. I saw defendant sign the bill of exchange by writing his name across it in my office at Newcastle:

"*Held*, in accordance with an objection raised by defendant's solicitor, that the bill was not accepted by the defendant within the meaning of 19 & 20 Vict. c. 97, s. 6, owing to the absence of the word accepted on the bill.

"Judgment for defendant."

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acceptance be in writing on such bill. This statute, however, does not apply to foreign bills, and does not require the acceptance to be signed. Finally, the 19 & 20 Vict. c. 97, s. 6, enacts that no acceptance of a bill, *inland or foreign*, made after the year 1856, shall charge any person, unless in writing on the bill, and *signed* by the acceptor or some person duly authorised by him. The usual mode of making such an acceptance on the bill was, even before the last mentioned statute, by writing the word *accepted*, and subscribing the drawee's name. Signature was not essential to a written acceptance within the stat. 1 & 2 Geo. 4, c. 78, but it was a question for the jury whether the acceptance was complete; *Dufaur* v. *Oœnden.* (1) But the drawee's name alone written on any part of the bill was a good acceptance: so, without any name, the word 'accepted,' 'presented,' 'seen,' the day of the month, or a direction to another person to pay it: *Anonymous* (2); *Powell* v. *Monnier* (3); *Moor* v. *Withy* (4); *Dufaur* v. *Oœnden.* (1) In *Armfield* v. *Allport* (5), which was decided after the last-mentioned statute, Pollock, C.B., delivering the judgment of the Court, says,—"A man who writes his name across a stamped paper as acceptor, there being a direction to him upon the paper, is liable: he gives his authority to anybody to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose." (6)

[DENMAN, J. "As acceptor:" but, has any case held that the mere signature of the name, and nothing more, will do?]

There is no such case: but, coupled with the direction of the bill to the drawee, the mere signature ought to be enough to satisfy the statute.

[DENMAN, J. There can be no doubt that signature is necessary now. The only question is whether "accepted" or some other equivalent word is also required.

GROVE, J. The acceptance "shall be in writing," *and* "signed by the acceptor."]

Meek, for the defendant. The impression of the learned author of Byles on Bills evidently is that both acceptance and signature

(1) 1 M. & Rob. 90.
(2) Comb. 401.
(3) 1 Atk. 611.
(4) B. N. P. 270.
(5) 27 L. J. (Ex.) 42.
(6) See *Leslie* v. *Hastings*, 1 M. & Rob. 119.

are necessary since the passing of 19 & 20 Vict. c. 97, s. 6, which enacts that "no acceptance of any bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same" (that is, the acceptance,) "be in writing on such bill, and signed by the acceptor or some person duly authorized by him." The "acceptance" evidently means a substantive act, something which shall have the effect of calling the party's attention to the nature of the document to which he is attaching his signature.

[DENMAN, J. Suppose the defendant had written across the bill "All right," and then put his signature to it, would that have been an acceptance within the statute?]

Before 1 & 2 Geo. 4, c. 78, "All right" alone would have sufficed. And now the same words coupled with the signature of the drawee would probably be held enough to charge the party.

GROVE, J. This case raises an important question, and we will take time to consider it.

Cur. adv. vult.

March 2. The judgment of the Court (Grove and Denman, JJ.) was delivered by

DENMAN, J. This was an appeal from a decision of the learned judge of the county court of Northumberland holden at Newcastle.

The action was brought by the plaintiff as drawer against the defendant as acceptor of a bill of exchange; and the question raised upon the case was, "whether the bill was sufficiently accepted," the defendant having merely written his name across the face of it, without having used any words amounting to a statement that he accepted the bill.

Before the statute of 1 & 2 Geo. 4, c. 78, s. 2, it was not necessary that a bill should be accepted by any writing upon the bill itself; it was sufficient if in any other document the acceptor used language shewing his intention to be bound by the bill as acceptor: *Wynne* v. *Raikes* (1) and other cases. It was also sufficient before that statute if the drawee verbally undertook to pay an existing bill: *Lumley* v. *Palmer* (2); *Powell* v. *Monnier* (3). Disapproba-

(1) 5 East, 514. (2) 2 Str. 1000.
(3) 1 Atk. 613.

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tion of the law as it then existed was expressed by very learned judges: see per Lord Kenyon in *Johnson* v. *Collins* (1), and per Lord Ellenborough in *Clark* v. *Cook* (2); and it was one of the particulars in which the English law was at variance with the law of Scotland.

In the year 1821, it was enacted by 1 & 2 Geo. 4, c. 78, s. 2, "that no acceptance shall be sufficient to charge any person unless such acceptance be in writing on such bill."

Since this statute, it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the statute: Selwyn's Nisi Prius, 11th ed. p. 348; Byles on Bills, 12th ed. p. 191; and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice: *Dufour* v. *Oxenden* (3): see also *Corlett* v. *Conway*. (4)

By 19 & 20 Vict. c. 97, s. 6, it was enacted "that no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless the same be in writing on such bill, *and* signed by the acceptor or some person duly authorized by him."

In the present case it was contended that, inasmuch as before the statute a mere signature would have been a sufficient acceptance in writing within 1 & 2 Geo. 4, c. 78, s. 2, it was not the less so now; and that, inasmuch as it was a signature of the acceptor, the bill was both accepted in writing and signed by the acceptor, within the meaning of the later enactment. But, looking at the history of the law and of the enactments on the subject, we are of opinion that the county court judge was right in holding that the statute had not been complied with.

It is not for us to speculate upon the object of the legislature; but, if it were necessary to do so, we think it may well have been intended by the enactment now in question to prevent ignorant persons from being too easily bound by a mere signing of their names; and that it was therefore purposely required that there should be upon the face of the bill some words indicating an intention to be bound by it as acceptor, as well as the mere signature of the party.

(1) 1 East, 98.
(2) 4 East, 72.
(3) 1 M. & Rob. 90, per Patteson, J.
(4) 5 M. & W. 655, per Parke, B.

Comparing the words of the later statute with those of the former, we think it impossible that a mere signature of a name can be held to fulfil the double requirement that the acceptance shall be in writing on the bill, *and* signed by the acceptor. We therefore think that, upon the question submitted to us, the learned county court judge was right.

It appears to us, however, that there is a statement upon the face of the case which makes it at least doubtful whether the judgment for the defendant ought to stand. It is stated in par. 3 of the case "that the plaintiff proved that the bill was given for value." If this means that the plaintiff proved that the defendant received an advance of money from him, or goods, for the value of which the bill was given, it would appear to be a case in which the learned judge had full power to amend the claim and give judgment for the plaintiff: 19 & 20 Vict. c. 108, s. 97: and we do not see any reason why this should not now be done, so far as appears upon the face of the case.

We desire, however, not to be considered as withdrawing this question from the discretion of the county court judge, inasmuch as the case before us having been stated with the view of raising the point of law upon which we have given our decision, he may possibly have stated the facts with regard to proof of value more in favour of the plaintiff than would have been warranted if the learned judge had had the question argued before him.

We think that the case should be remitted to the county court judge, in order that he may re-consider this point, and give judgment for the plaintiff or defendant according as he may think right to act upon this suggestion or not, with reference to the facts actually proved.

Judgment accordingly.

Solicitors for plaintiff: *Williamson, Hill, & Co., for Ingledew & Daggett, North Shields.*

Solicitor for defendant: *John Scaife, for Duncan & Duncan, South Shields.*

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Dec. 20.

[IN THE COURT OF APPEAL.]

LONGMAN *v.* EAST.
PONTIFEX *v.* SEVERN.
MELLIN *v.* MONICO.

Practice—Reference under Judicature Act, 1873, ss. 56, 57—Official Referee—Reference for Report—Reference for Trial.

The Court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and, if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any questions referred to him under ss. 56, 67, of the Judicature Act, 1873.

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Claim alleged that the plaintiff was possessed of a weir, situate on the river Test, and that the defendant had pulled down and destroyed the weir.

Defence denied the allegations in the statement of claim; and set up as a counter-claim a claim of damages for the flooding of the defendant's meadow, and obstruction to his right of navigation by reason of the wrongful erection of the weir.

Reply: joinder of issue, and defence to the counter-claim a prescriptive right to do what was complained of.

The defendant took out a summons, calling on the plaintiff to shew cause why the action should not be referred to an official referee, stating that the cause required a prolonged examination of documents, and a local investigation. At the hearing the judge made an order that the action be referred to an official referee, pursuant to the Judicature Acts, 1873 and 1875 (1), unless the parties should agree on a special referee within a fortnight.

(1) By s. 56 of the Judicature Act, 1873, subject to any Rules of Court, and to such right as may now exist, to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice, or before the Court of Appeal, may be referred by the Court or any Divisional

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The plaintiff appealed to the Common Pleas Division, on the ground that the judge at chambers had no jurisdiction under s. 57 of the Judicature Act, 1873, to refer the action to an official referee. The Common Pleas Division rescinded the judge's order. The defendant appealed.

Dec. 5, 6. *Channell*, for the defendant. The decision of the Common Pleas Division is wrong. The Judicature Acts give power to the Common Law Divisions to refer the whole action for trial. There are two modes in which questions may be referred to official referees. By s. 56 any question arising in the cause may be referred for inquiry and report, that is, any question arising incidentally in the cause; but under s. 57 the action may be referred to the official referee for trial. The words are, "In any cause or matter . . . . the Court may order any question or issue of fact, or any question of account arising therein, to be tried." These words include the whole controversy between the parties, which, therefore, may be decided by the official referee. Sect. 58

Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee; and the report of any such referee may be adopted wholly or partially by the Court, and may, if so adopted, be enforced as a judgment by the Court . . . .

By s. 57 in any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without any consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court though its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before an official referee to be appointed as hereinafter to be provided, or before a special referee to be agreed on between the parties . . . . all such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or a judge ordering the same shall direct.

By s. 58 in all cases of any reference to or trial by referees under this Act, the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court, or subject to such rules by the Court or judge ordering such reference or trial: and the report of any referee upon any question of fact on any such trial shall, unless set aside by the Court, be equivalent to the verdict of a jury.

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recognises these two modes of reference—a reference for report and a reference for trial—and then it states how the decision of the referee is to be dealt with: it is to be equivalent to the verdict of a jury. Sect. 83 appoints the official referees "for the trial of such questions as shall, under the provisions of this Act, be directed to be tried by such referees." The orders and rules made for carrying out the Act are all consistent with this view; they all recognise two distinct things—inquiry for report, and a trial of the question in dispute. Order XXXVI. relates to the trial of actions, and Rule 2 provides for the trial before the official referee, and it places that trial on the same footing as a trial of an action before a judge and jury. Rule 3 provides for giving notice of trial, and the plaintiff may specify one of the modes of trial mentioned in Rule 2, that is, he may give a notice of trial that the action shall be tried before the special referee. Rule 5 provides that if the case is within s. 57, that is, the action can be referred to an official referee without consent, either party may apply to the Court or judge for an order to that effect four days from the time of the service of the notice of trial. The effect of this rule is, that although a party need not refer the whole action, yet he may do so if he desires it. By Rule 27 if the whole action has been referred to be tried before a official referee, yet the Court may direct any issue of fact to be tried before a jury. Rule 30 assumes that the whole action may be sent to the official referee: the language is, where any cause or matter, or any question in a cause or matter, is referred to a referee, he may hold the trial at any place he may deem convenient.

[BRETT, L.J. That rule relates to a reference under s. 57, and it assumes that the whole cause is within s. 57, but if some of the questions are within and some without s. 57, that rule does not apply.]

Rule 31 refers to the evidence taken before a referee, and rule 32 gives the referee the same authority as a judge sitting at Nisi Prius. Rule 34 is important, for it shews that a referee is not always to state the facts specially; but he may where the reference is for trial, before the conclusion of the trial, state any facts specially for the opinion of the Court. Order XL., Rule 2, provides, where at the trial of an action a judge or a referee has

ordered any judgment to be entered the action may be set down upon motion for judgment. This rule, therefore, contemplates that judgment shall be entered by a referee in an action, and Rule 3 speaks of where, at the trial of an action, the judge or referee abstains from directing any judgment to be entered, the plaintiff, or in his default the defendant, may set down the action on motion for judgment. The whole scheme of the Judicature Acts, including the Orders and Rules, shew an intention that the whole action shall be tried and determined by an official referee in the same manner as if it were a trial before a judge and jury: *Cruikshank* v. *Floating Swimming Bath Company* (1), and *Lloyd* v. *Lewis* (2) shew that the Judicature Acts in no way interfere with the power to refer which existed under the Common Law Procedure Act, 1854.

This is a case fitted for a local investigation, which can be better carried out before a referee than before a jury; and if one question in dispute falls within the terms of s. 57, the whole action may be ordered to be determined by the referee; for s. 57 ought to be construed in the same manner as the Common Law Procedure Act, 1854, s. 3, which allows an action partly involving a matter of mere account to be referred compulsorily to an arbitrator.

H. T. Cole, Q.C., and *Pitt Lewis*, for the plaintiff. There is no power under s. 56 or s. 57 to refer the whole cause of action to an official referee. The two sections must be read together, and the introductory portion of s. 56 shews it was intended that trial by jury should be preserved. Order XXXVI., Rule 2, which enables an action to be tried before an official referee, is limited to those cases where the only matter in dispute falls within the terms of s. 57. *Sugg* v. *Silber* (3) shews that the right to a trial by jury cannot be taken away except by express enactment. The orders and rules, which can be altered from time to time by the authority of the judges, cannot be read as extending the scope of the sections contained in the Act of 1873.

Channell, in reply. If the order to refer the action to a referee is irregular, this Court can mould it so as to direct that the issues

(1) 1 C. P. D. 260. (2) 2 Ex. D. 7.
(3) 1 Q. B. D. 362.

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requiring prolonged examination of documents and local investigation may be referred to a referee to be tried.

The Court intimated that before giving judgment they would hear the arguments in the two following cases.

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Claim for not accepting a refrigerator made pursuant to defendant's order.

Defence, that the refrigerator was badly made, and therefore worthless; that the plaintiff did not offer to deliver it within a reasonable time, nor except at an unreasonable price. Counter-claim that the refrigerator was of a new kind, for which the plaintiff had obtained letters patent; that it was required for the purpose of exhibiting it to brewers and others with a view to procure purchasers, and that by the defaults of the plaintiff, the defendant has been prevented from so exhibiting it and from procuring purchasers, and he claimed 200*l.* damages.

Issue was joined on the statement of defence. The plaintiff denied the allegations in the counter-claim. Issue thereon.

At the trial at the London sittings on the 22nd of June, 1877, before Pollock, B., and a jury, the judge intimated that the action was one which could not be conveniently tried by a jury, and that he should order a reference to an official referee unless the parties agreed upon a special referee; the case was thereupon adjourned to the 27th of June. On that day, the parties not having arrived at any agreement, Cleasby, B., made an order "that this action be referred to one of the official referees under s. 57 of the Judicature Act, 1873."

The affidavit on behalf of the defendant stated that no copy of the order of reference was ever served upon him or his solicitors, and it was only after the official referee had made his award that the defendant became aware of the terms of the order.

The parties, however, attended before the referee, who, after hearing the facts, reported to the Court that the plaintiff was entitled to recover against the defendant 90*l.*, and that the defendant was not entitled to recover against the plaintiff in respect of his counter-claim, and he directed judgment to be entered for

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the plaintiff in the action for the sum of 90*l.* The plaintiff signed judgment accordingly.

A motion was made by the defendant to the Exchequer Division to set aside the judgment on the ground that the official referee had no power by his certificate to order judgment for the plaintiff; and also to set aside the certificate or report on the ground that the official referee ought to have reported specifically upon the several facts which were at issue under the pleadings in the action; and also to set aside or amend the order of Cleasby, B., under which the reference to the official referee was made, on the ground that such reference could only, and was intended only, to extend to a reference to the official referee for his report thereon of the facts involved in the pleadings in the action.

The Exchequer Division set aside the judgment and refused the residue of the motion.

The defendant appealed against that part of the order which refused the residue of the motion.

The plaintiff appealed against that part of the order which set aside the judgment.

Dec. 12. *C. Gould*, for the defendant, cited *Mayor of Birmingham* v. *Allen*. (1)

G. R. Kennedy, for the plaintiff (2).

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Claim for breach of an agreement by the defendant to compensate the plaintiff for injury done by rebuilding the defendant's premises, which adjoined the plaintiff's shop, and by encroaching on the plaintiff's premises; the plaintiff also alleged that the defendant had exceeded the powers given to him by the Metropolitan Building Act (18 & 19 Vict. c. 122) in such a manner as to cause unnecessary inconvenience to the plaintiff as the adjoining owner to the defendant.

The defendant denied the allegations of damage, and paid 20*l.* into Court. Joinder of issue.

(1) Weekly Notes (1877), p. 190.

(2) The arguments in *Pontifex* v. *Severn* and *Mellin* v. *Monico* were similar to those in *Longman* v. *East*, and are sufficiently noticed in the judgments.

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On the 5th of June a master, on a summons dated the 4th of June, ordered, at the instance of the plaintiff, that the action should be referred for trial to one of the official referees, who should have all the powers of certifying and amending as a judge at nisi prius, and should make an order or certificate in writing of and concerning the matters ordered to be tried, and that the costs of the action and of the trial should be at the discretion of the referee. The defendant did not consent to the above order, but indorsed the summons "no cause to shew," and the order was drawn up in the above form. The summons was indorsed with the words "Act 1873, s. 57." The official referee having been appointed, on the 13th of July, according to the rota, on the same day notice of trial of the action was given before him. The action was tried before the official referee, and on the 22nd of September he made the following certificate: "That the plaintiff was entitled to judgment in respect of the defendant's encroachment for the sum of 1s., and that the defendant was entitled to judgment in respect of all other matters," and he directed that judgment be entered in the action accordingly; and as to the costs, he directed that the defendant should pay them up to the time of the payment into Court, and that the defendant should pay the costs of such part of the action as related to the encroachments, and that the plaintiff should pay all the other costs of the action and of the trial. On the 12th of November, the Queen's Bench Division ordered that the certificate should be referred back to the official referee to state his reasons thereon. On the 30th of November the official referee stated his reasons for the certificate at length. On the 5th of December, the plaintiff moved to set aside the certificate and to enter judgment for him, and to remit the action to the official referee to report to the Court the amount of damage sustained by the plaintiff. On the 10th of December the defendant moved to set aside previous proceedings in the Queen's Bench Division on the ground that the Court, not being informed to the contrary, allowed the plaintiff's motion on the understanding that the reference was made under s. 56 of the Judicature Act, 1873, and not under the old procedure. The Queen's Bench Division allowed the defendant's application.

The plaintiff appealed, on the ground that the decision of the

Queen's Bench Division that the official referee acted as an arbitrator under the old procedure and not under the provisions of the Judicature Act, could not be supported in law or fact.

Dec. 19, 20. *Castle*, for the plaintiff. (1)
Watkin Williams, Q.C., and *H. Lush*, for the defendant.

BRAMWELL, L.J. I am of opinion that the appeal in the case of *Mellin* v. *Monico* should be dismissed. I have no doubt that both plaintiff and defendant thought that they were referring this matter under the provisions of the Judicature Act. Whether they thought they were referring under s. 56 or s. 57 is doubtful; but, judging from the application made to the Queen's Bench Division, I should suppose they thought it was a reference under s. 56, and to judge from the application made here I should suppose they thought it was under s. 57. What happened was this. An order was made to refer the action to an official referee. Now, I am of opinion, and I speak with confidence, that there is no power under either of these sections to refer an action to an official referee.

Under s. 56 any question arising in the cause may be referred by the Court or judge for inquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is 20 feet high, and the other that it is 25 feet—the referee, in such a case as that, must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act. Clearly, under s. 56 an action cannot be referred to him to decide facts and law. In the like way, under s. 57 all that can be done is, in a case where there is no consent, the judge can refer issues of such a character as are mentioned, that is to say, where they require any prolonged examination of documents or accounts,

(1) During the argument the counsel for the plaintiff applied to the Court to remit the action to the official referee for re-trial or further consideration under Order XXXVI., Rule 34, or under a clause in the order of reference empowering the Court to remit the matters referred for re-trial.

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scientific or local investigation, which could not conveniently be made before a jury. Then the judge may without consent order any issue of fact involving any such matters to be tried by an official referee. Where there is a consent, his power is still confined, that is, he has no jurisdiction to order the action to be determined, but he may order any question or issue of fact to be tried; therefore the order would not be limited to such cases as before described, but would include any question or issue of fact, or any question of account arising therein. But there is no power to refer the action, only questions or issues of fact, and where there is no consent, it is only issues of facts of the particular character enumerated that can be referred, unless possibly some other issue of fact was so mixed up with them that it could not practically be dissevered. Although the words are "on such terms as may be thought proper," that does not authorize the judge to refer a different matter, or to refer that which he otherwise could not have referred, but it means he may do it on such terms as may be thought proper with a view to the decision of what he may refer, and with a view to who shall bear the costs afterwards. If that be so, this order which was drawn up was one which could not be properly drawn up under s. 57, and the learned referee might, if he had thought fit, have declined to take this case. But the referee did entertain the questions and pronounced his opinion. Now Mr. Castle applies for a new trial, and he observed—it is not necessary to express an opinion upon it, but I think his observation was a just one—that throughout the Judicature Acts, and Orders and Rules, the right of appeal and the right to move for a new trial exists, and why should it not exist here? I think that is a cogent argument, to say the least of it; and I think, therefore, if this order had been "It is ordered by consent that the following issues," or "all the issues of fact be referred to the referee," there would have been very considerable force in Mr. Castle's contention that he ought to be at liberty to have a new trial; but that is not the form of the order; the form of the order supposes, not a reference under s. 57, nor a reference under that section plus something else, the order is not in any sense under that section; and it seems to me that the form of the order contemplates that the learned referee shall act as an arbitrator—I do not say as an

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arbitrator under the compulsory clauses of the Common Law Procedure Act, 1854—but as an arbitrator upon whom the parties have agreed to settle the disputes between them. It is a submission by them to him. I know it is said that it is not by consent. But it is not possible for either of these parties at this time to modify the order. In the first place, Mr. Castle says he is content that the order should stand with all the terms that were in it, and he does not seek to modify it; of course he cannot make a contention to the contrary, because he obtained the order and it was drawn up at his instance; and if he had objected to it when it was drawn up, he might have applied to the judge to vary it on the ground that it had been drawn up in a wrong form; but I doubt very much whether he could have been heard to say that, because his own summons is to refer the action. It seems to me, therefore, clear that the plaintiff was bound by the terms of this order. Similar considerations shew that the defendants were bound by the terms of this order, and that they have become parties to a reference pure and simple, which is not under s. 57, and consequently that any right, if there is one, to move for a new trial on an issue of fact, which might have existed if the reference had been under that section, does not exist in this case, and therefore Mr. Castle's appeal must fail.

But there is another ground. Mr. Castle is appealing from what the Queen's Bench Division did, and his application to the Queen's Bench Division was a different one to that which he has made to us. His application was that the Court should act upon the report of the learned referee and should give judgment for him. They very properly refused to do so, and there cannot be a better proof that they properly refused it than that Mr. Castle does not ask to reverse their decision in that respect. I think, therefore, that he really is not appealing from their decision, but asking for a new order. This application ought to be refused on both these grounds.

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With regard to the case of *Pontifex* v. *Severn*, that was a compulsory reference, for the order was not made at the instance of either of the parties: the judge therefore must have intended to make it under s. 57; but I think the order was wrong, for he had no authority to refer the whole action. Possibly, if the judge's atten-

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tion had been called to it, he would have said that it was not his intention to refer the action, but only to refer certain issues. The officer of the court, however, drew up the common Nisi Prius order referring the action. The learned counsel for the defendant tells us he did not know that the order was drawn up referring the action, and it was not until the award was made that he ascertained that not only questions of fact under s. 57 had been referred to the referee, but that the whole action had been referred. I think he has a right to say that was an excess of jurisdiction, and that the order would be ultra vires of the judge, and unless it was acquiesced in, it was a bad order. It has never been urged on the part of the plaintiff that anything has been done by the defendant which would give validity to the order if it was not originally valid. It seems to us it was not originally valid, and consequently we think that the appeal in the case of *Pontifex* v. *Severn* should be allowed, and that the cross appeal of the plaintiff must be disallowed.

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As to the case of *Longman* v. *East*, Mr. Channell, after contending that the judgment of the Common Pleas Division was wrong, applied to us to modify the order, but I do not see that the considerations he presented were of such weight as to compel us to modify the order in the way in which Mr. Channell asks us. We think, therefore, that his appeal must be dismissed.

BRETT, L.J. I think it convenient, before I proceed to the construction of the Judicature Acts, to consider the kinds of references that existed previously to the passing of those statutes, and afterwards to consider the effect of the Judicature Acts on the then existing law. Before the Judicature Acts there were several modes in which disputes were remitted to the decision of third persons and which might be called references. There was the common law reference to an arbitrator constituted by the consent of the parties. There was the compulsory reference to an arbitrator under the provisions of the Common Law Procedure Act, 1854. There was the reference to the master to report in the Common Law Courts as to matters of discipline and similar questions, and in the Court of Chancery there was the reference into chambers.

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It was not intended by the Judicature Acts to interfere with these references, and they at present exist with all their incidents. But it was thought that further powers ought to be given to the divisional courts, and I think that s. 56 gives to the Chancery Division a new tribunal, that is to say, instead of referring certain questions for a report into chambers, that court may, if they think fit, refer questions to an official referee—an officer newly appointed with limited duties, and also with defined powers. Sect. 56, therefore, gives to that Division a new tribunal, in addition to their own chambers; but it gives to the Common Law Divisions a new power as well as a new tribunal; it gives them power to do what the Court of Chancery had done in a suit or cause. The Common Law Courts had no power previous to the passing of s. 56 to refer matters in a cause for report, but only to refer for report of the master matters of discipline; these matters the Court themselves were bound to decide upon the facts, but they sometimes delegated the duty to a master. This section, however, gives them power to remit questions in a cause for report in the same way as a question was referred in the Court of Chancery into chambers, and afterwards the report was brought back from chambers to the Court.

Sect. 57 gives powers both to the Chancery Division and to the Common Law Divisions which neither of them possessed before. It gives power to either Division to send certain questions or issues in causes to an official referee, or to a special referee, to be agreed on between the parties, not for report but for trial. That section gives powers to the Courts under two different sets of circumstances. In the one case it gives them power to remit more questions to the official referee than it does in the other; it deals with references to the official referee by consent of the parties and by compulsion. [The Lord Justice read the section.] In the sentence "which cannot, in the opinion of the Court or a judge, conveniently be made before a jury, or conducted by the Court through its ordinary officers," the former words apply evidently to the Common Law Divisions, where cases are tried by jury, and the latter to the Chancery Division.

I think, therefore, that where the parties have consented, the

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Court may send, not the whole cause, but any question or issue of fact in the cause, to an official referee to try. Where an order is made without consent, they can only send such questions as are brought within the terms of the section, that is, any issue requiring a prolonged examination of documents, or requiring the examination of accounts, or requiring any scientific or local investigation. But then it is not every question which requires scientific or local investigation, or an examination of documents or accounts, which can be referred to the official referee. The governing words of the section are, "which cannot in the opinion of the Court or a judge"—it must be a judicial opinion—"conveniently be made before a jury or conducted by the Court through its ordinary officers." If any part of a cause is brought within these terms, then the Court or a judge may by compulsion, at any time before or at the trial, order those questions or those issues which are thus brought within the definition, to be tried by an official referee.

In the first case, where the reference is by consent of the parties, I think that all issues of fact may be sent before an official referee, but that questions of law cannot be sent to him even by consent of the parties; they have no right to impose upon the official referee such a reference, but if the parties agree, then it seems to me that all the issues of fact in a case may be sent to the official referee to try. If by consent all the questions of fact in a cause are sent to an official referee, and if there are no issues of law to be afterward decided by the Court, then I incline to think that the parties may relieve the official referee from reporting or finding expressly as to each question of fact, and that they may consent to his reporting to the Court the general effect of his finding of all the facts in the form "that, having tried all the issues of fact, he found the result to be in favour of the plaintiff or the defendant." But I think that the referee has no jurisdiction to order judgment to be entered, that must be the act of the Court. If the parties consent that the referee shall try all the issues of fact, and, further, consent that he shall report generally, I think even in such a case there is an appeal from him under s. 58, on which I will presently express my opinion.

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If the reference to the official referee, under s. 57, is without consent, I think that he is only to try the issues which may be sent to him; not to report the evidence upon which he found each issue, but to state the result of each issue, and then the Court will have to give judgment as they think right upon the findings, it being possible that there may be several other issues in the same cause to be tried in another manner. Then the whole result must afterwards be brought before the Court, and the Court must give a decree or a judgment accordingly, as is done in the Chancery Division. There is, I think, an appeal from the findings of the official referee on such issues.

The next question is, what is the nature of appeal which is given? That will be found at the end of s. 58: the words are, "and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury." I should say that, in the case of a report to the Court or judge under s. 56, the Court or judge may differ from the official referee as to any finding which is an inference from the facts that the referee has reported; they may deal with his report generally in the same way as the Courts do with a report of the master upon a matter of discipline. But with regard to the finding of a referee of issues of fact sent to him under s. 57, either by consent of the parties or without consent, I think the appeal is of the same nature as the appeal from the finding of a judge when he tries without a jury, or as the appeal from the finding of a jury; that is to say, the Court must accept the finding of the referee, unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a judge trying a cause without a jury. It is open to appeal, therefore, whether improper evidence has been received by the official referee, or whether the official referee, in considering the facts, has, so to speak, misdirected himself. The Court can set aside the finding of the official referee, if they consider that the finding is a finding against the evidence, in the same way that the Court set aside the finding of a jury when their finding is against the evidence. In that case, if the issue were a material one, the Court would have to send back that issue to the referee, or to

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some other referee, to be tried. I have now given my opinion on the construction of the three sections of the statute read by themselves.

But it has been urged that the effect of the Act of 1873 has been altered and enlarged by the orders and by the rules. When we recollect that these orders and rules were made before the Act of 1875 was passed, that they were, at all events, drawn and made at the time when they were no part of that statute, and that they were orders and rules of the judges, which were liable to be changed from time to time, (1) I find it difficult to suppose that those who framed the orders and rules intended to go beyond the Act of 1873; I think that they were made to carry out that statute, and not to extend it. It is true that the orders are made part of the Act of 1875, and have all the force of an enactment, but even then they are to be read as parts of the earlier statute; and that where in the same statute are found clear enactments as to jurisdiction, and enactments as to procedure under that jurisdiction, the latter must be construed, if possible, so as to make them consistent with the former, and not so to enlarge the jurisdiction.

Order XXXVI. and the rules under it are those which have been chiefly referred to. Rule 2 was mentioned to shew that actions could be tried by the official referee or special referee. I am of opinion that that rule ought to be read as a mere enumeration of the modes of trial which were existing under the Judicature Act, and it is to be read reddendo singula singulis, and thus read it must be such a trial by the official referee, or special referee, as the law enables the official referee or special referee to hold, and I think that the word "action" should not be read necessarily as "the whole action," but where, by the law, the jurisdiction of the referee is only given as to parts of the action, the word "action" is to be read there as that which the referee may try. Rule 5 was also relied upon, but that rule does not affect the jurisdiction. I think that where under s. 57 a judge has made an order without consent to try the issues before the official referee, if a party desires to have the whole action tried,

(1) See ss. 16 & 17 of the Judicature Act, 1875.

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or the issues tried in any other mode than that specified, he shall apply to the Court for an order to that effect under this rule: it does not follow that the Court would grant that application; I do not, however, think that that rule is inconsistent with s. 57. We have also to deal with rule 30. In that rule it is true that the words are "where any cause or matter, or any question in any cause or matter is referred to a referee." I think that rule should be read in the same way as I have read rule 2—it does not enlarge the jurisdiction. The rule is dealing with the place at which and time within which the trial is to take place, and its meaning fairly construed is that the trial which has been compulsorily ordered is to be conducted in a particular place and in a particular way. I think there is nothing in the rules which was intended, or which necessarily in effect altered the legislation which is contained in ss. 56 and 57 of the Act of 1873, and according to my construction of those sections the official referee cannot be made without his consent to act as an arbitrator. If the parties agree that an official referee shall act as an arbitrator, it is within his option to accept or refuse such a reference. If he accepts it, he is no longer acting as an official referee under the statute, he is merely an arbitrator between the parties.

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That being my opinion of the law, I proceed to apply it. In *Longman* v. *East* I think that the order was to refer to an official referee with the intention that he should decide as an arbitrator. I think the judge had no power to make such an order, and therefore when the Divisional Court set aside the order their decision was right. But then it is said, conceding that they were right in setting aside the order, the facts of that case had brought it within the terms of s. 57, and we were asked to send all the issues in the case which came within the definition "to be tried by the official referee." That contention raised another question as to the construction of the statute, which I have omitted to notice. It was contended that s. 57 was to be construed as s. 3 of the Common Law Procedure Act, 1854, had been construed, that is to say, where a part of a cause was considered by the judge a matter of account which could not be conveniently tried in court the judge under the Common Law

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Procedure Act, 1854, referred the whole cause. But in my opinion that is not the construction of s. 57. I do not think because one issue in the cause is brought within the terms of s. 57, the Court or judge have power to order all the issues in the cause to be sent to the official referee, unless those other issues are so mixed up with that issue that although they are different issues in form, yet in substance there is really only one issue. Mr. Channell's application in this case to send all the questions in the cause to the official referee, because some of them were within the definitions of s. 57, ought not to be granted. I further think that Mr. Channell did not establish that this was a cause which might not be conveniently tried by a judge and a jury, and therefore it was not brought within s. 57.

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With regard to *Pontifex* v. *Severn*, the order there was one which the judge had no jurisdiction to make without the consent of the parties, and, as there was no acquiescence, the defendant is not precluded from taking the objection. I think therefore the decision of the Divisional Court is wrong.

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With regard to *Mellin* v. *Monico* I think that the order in that case as drawn up is inconsistent with the powers to refer contained in the Act of 1873, and is therefore a bad order; but the plaintiff having consented to the order in that form, and acted upon it up to the end, and taken his chance of a decision in his favour, we must hold that he accepted it not as a reference under the Judicature Act, but as a reference to the official referee, which he consented to take not as official referee but as an arbitrator at common law. If that were not so, then I should say there would be an appeal, but then that would have been such an appeal as I have described—that is to say, Mr. Castle might, if he had had materials, have moved as for a misdirection or a decision against evidence. But he did not take that course in the Court below, and it does not seem to me that he really had materials upon which he could have moved. He desired to have the case treated in the Court below as if it were a report under s. 56 instead of a trial under s. 57; but even if he had the materials to ask for any remedy he did not ask for the right one. If, therefore, he did not ask for the right remedy, but for a wholly distinct

remedy, it seems to me he cannot now change the form of his application on appeal. In either view I think his motion ought to be refused.

COTTON, L.J. Before I proceed to deal with the three appeals which are before us, I will first consider the sections of the Act of 1873.

Sections 56 and 57, on the face of them, relate to very different matters. Sect. 56 provides for cases which frequently occurred in the Court of Chancery, where on some question being raised either of a scientific or other nature requiring special knowledge, the evidence was conflicting, or the witnesses differed (as for instance, as to what would be the result of a certain act sought to be restrained by injunction, or as to what ought to be done in order to remedy a particular state of things, or as to what timber was fit to be cut), it was not unusual to direct a reference to some expert or scientific man to report to the Court upon the question as to which there was a conflict of evidence, or as to which for any other reason the Court desired to have information. These cases, by s. 56, may be referred to an official referee, who is not to find the issues between the parties, but to make a report, and that report is for the assistance of the Court, as is shewn by this, that it may be adopted wholly or partially by the Court, and when adopted may be enforced as a judgment of the Court.

Section 57 provides for a different matter. As I understand it, it is to enable certain issues of fact arising in a cause, which the Court or judge thinks cannot be conveniently tried before the Court or judge either with or without a jury, to be referred to another tribunal—and that really is acting upon what formerly was constantly the practice in the Court of Chancery. Very frequently on the original hearing of a cause, nothing was done except to refer it to the judge at chambers under the late practice, or under the older practice to the master to inquire and state to the Court what was the result of certain issues raised between the parties. As for instance, whether or not there was any part of the testator's estate employed in carrying on the business of partnership. If there was, the result would be that his estate would

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have a right primâ facie to a share of the profits. Or to ascertain, for instance, what mines had been opened before the estate of the tenant for life came into possession, so that they were mines which he might go on working; or, on the other hand, what mines had been opened during his lifetime, so that they were mines which he would not be able to work. Those were issues of fact which frequently arose in cases before the Court of Chancery, which sometimes were sent to the master and afterwards to the judge in chambers, and sometimes they were sent to be decided by an issue to be tried before a judge and jury. As I understand this section, by consent in all cases, and in particular cases without consent, there is a power, not to send or transfer a cause to another tribunal but, simply to have certain issues of fact determined otherwise than before the Court. That, I think, is a very intelligible meaning of this section, and when the section is carefully read nothing is found in it about transferring the cause or sending the cause to be tried, it is confined simply to issues of fact, or matters of account, which are questions of fact. My own opinion is, that the issues which without consent may be sent to a referee cannot be restricted to those issues which involve local or scientific examination or matters of account. There may be certain issues so connected with the matters of account or with the matters requiring local inquiry or scientific examination, that it would be hardly possible fairly to deal with the issues not of that special character, without sending them to the same person who is to deal with those requiring scientific examination or local investigation, or matters of account. But, in my opinion, it would be wrong even if there is any jurisdiction, which I do not say there is, to transfer all the issues in a cause to a referee simply because there is a matter of account which can only be properly dealt with by him. If we look at s. 57, we see how clearly there is to be no reference or transfer of the cause. I think that the Court has no power, taking the words of that section in their ordinary meaning, to transfer the cause to be dealt with as a whole before a different tribunal: it is simply questions or issues of fact. Then those questions or issues of fact will, if referred, and, so far as they can be referred, be tried, not before a judge and jury, but before a

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referee, subject to his finding of the issues between the parties being dealt with under s. 58, which is as if it was a finding of the jury of certain issues of fact between the parties. I will make an observation on the words "on such terms as may be thought proper." That cannot extend the other provisions of the section so as to enable the Court instead of sending to the referee issues of fact or matters of account to send matters of law. It must be such terms as it would be proper to impose with reference to those matters which the section authorizes the Court to send to be tried before the referee instead of before itself, or before a judge and jury. But to say that the words "on such terms as may be thought proper" give to the Court the power to substitute a referee for itself as judge of law would be entirely altering the section—altering by saying the power of the Court to impose such terms as it thinks fit when it sends issues of fact to be tried enables it to send points of law to be tried—that would not be a reasonable construction of the section, and is not the correct construction.

But I must confess there is some difficulty arising from the words of the orders which have been mentioned. If those orders enlarged the jurisdiction given by the Act to the referees, I should have expected it to be done in clear and precise terms. No doubt some of them do seem to assume that there may be a trial of the action before a referee, but they assume it, they do not purport to give the power, and in my opinion the construction of the Act of 1873 is clear that the action cannot be transferred to the referee for the purpose not only of deciding issues of fact, but also for the purpose of deciding questions of law, and giving ultimate judgment between the parties, and that these ambiguous expressions in the orders, whatever they may mean, cannot be taken as enlarging the jurisdiction given by the Act of 1873, or of enabling us to say that under the Act of 1873 there can be a transfer to a referee so as to enable him not only to decide issues of fact, but to act as the Court would have acted, and to decide all questions between the parties, even to the extent of giving judgment.

I will consider the three cases which wait our decision. With regard to *Mellin* v. *Monico,* I entirely concur in what has been

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said by Bramwell and Brett, L.JJ. The order in that case was not justified by the Act of 1873. The plaintiff drew up the order, and although he might then have appealed against it if he did not like its terms, he has not done so; he took the chance of success under that order so framed, and he is too late in making his application to set it aside.

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In *Longman* v. *East*, the defendant refused to refer the action which was brought to recover damages done to a weir in a river —he afterwards modified that, and said, "I ask a reference of the action, and if I am not entitled to that, I ask for such an order as I can get under s. 57;" he sought, no doubt, to get a transfer of the action to the referee with all the consequences, saying he would be content if he got a trial of all the issues of fact before a referee. Now, in that case, I certainly should say, whatever may be done in many other cases, all the issues of fact clearly are not to be tried before a referee—they are much more fit to be tried before a judge and jury, and, having regard to the nature of the action, I should say he would have entirely failed to make out that the issues of fact cannot be conveniently tried before the Court or a judge and jury, and if the Court below did not exercise its discretion in considering whether the matter ought to go to the referee, and we had to exercise the discretion, I should decline to send it to a referee. I have no hesitation in saying that in my opinion it seems to me that, except under very special circumstances, the parties should not be deprived of their right of having their cases, if they desire it, adjudicated upon before the ordinary tribunals and in the ordinary way—therefore this application must fail.

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In *Pontifex* v. *Severn* there was an appeal and a cross appeal, but the cross appeal I will deal with first, because that asked that the order of the Court below, discharging so much of the order as allowed judgment to be given by the referee, should be reversed. From what I have said, it follows that it would have been impossible to give to the referee power to enter up judgment for one party or the other. Then there was an original appeal which was an appeal against the refusal of the Court below to discharge the order to refer the action. In my opinion that appeal was right—

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there was no jurisdiction under the Act of 1873, to refer the action—but only to refer certain definite issues, or, in some cases, all the issues involved in the action.

In Longman v. *East, judgment affirmed.*
In Pontifex v. *Severn, judgment reversed, and cross appeal dismissed.*
In Mellin v. *Monico, judgment affirmed.* (1)

Solicitors in 1st case for plaintiff: *Garrard, James, & Woolfe, for J. Smith, Andover.*
Solicitors in 1st case for defendant: *Allen & Son.*
Solicitors in 2nd case for plaintiff: *Learoyd & Peace.*
Solicitors in 2nd case for defendant: *Geare & Son.*
Solicitor in 3rd case for plaintiff: *S. S. Seal.*
Solicitor in 3rd case for defendant: *Rooper.*

[IN THE COURT OF APPEAL.]

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Feb. 8.

FRENCH *v.* NEWGASS.

Ship and Shipping—Charterparty—Description of Vessel—Warranty.

A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made.

Hurst v. *Usborne* (18 C. B. 144) approved of.

APPEAL from the judgment after trial before Denman, J., in favour of the plaintiff, in an action for refusing to load a vessel pursuant to a charterparty.

At the trial at the Liverpool Assizes, 1878, the following facts were proved:—The plaintiff was the owner of a vessel called the *William Jackson*, and he chartered her to the defendant to

(1) The Court intimated that the forms of the orders of reference in use were incorrect. That an order need not be absolutely precise and particular, but that it should point out whether it is an order under s. 56 of a reference for report, or an order under s. 57 of issues to be tried; and further, if it is an order made under s. 57, it should state whether all the issues of fact are to be tried, or only certain issues, and if only certain issues the order should state by some sufficient description the issues of fact to be tried.

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proceed to New Orleans, and there to load as customary from the agents of the charterer a cargo of cotton, and from thence to proceed to Liverpool. The material parts of the charterparty were as follows:—"A 1½ Record of American and Foreign Shipping Book. London, 4 Sept., 1876. Charterparty. It is mutually agreed between the owners of the ship *William Jackson*, newly classed as above, . . . and B. Newgass & Co., merchants, of Liverpool, &c." At the time the charterparty was made the *William Jackson* was on the register of the American and Foreign Shipping classed as stated in the charterparty. The ship sailed for New Orleans, and arrived there on the 13th of November, 1876, and was ready to receive her cargo from the defendant, and to complete her chartered voyage. On the 25th of November the inspectors of several local and foreign insurance offices and underwriters at New Orleans declared the ship to be unseaworthy, and the classification of the ship (A 1½ Record of American and Foreign Shipping) was cancelled by the American and Foreign Shipping Association. The defendant under the circumstances declined to load the vessel. Judgment was entered for the plaintiff.

Herschell, Q.C., and *Butler*, for the defendant. The authorities shew that a description of a vessel in a charterparty is a warranty. The case is not similar to *Hurst* v. *Usborne* (1), where after the warranty the vessel had run off her class, but here the classification was void ab initio. The classification having been annulled the charterer is in the same position as if the vessel had never been classed; it is as if the shipowner had offered the charterer an unclassed ship; in that case the charterer would not be bound to load the ship, and to pay a freight equal to that he would have to pay for a classed vessel. The warranty is that the vessel is absolutely and not voidably on the register as A 1½, and will continue so classed for the time that she purports to be so classed, and that she is rightfully on the register according to the classification described in the charterparty. By the act of the shipowner the adventure was frustrated: *Jackson* v. *Universal Marine Insurance Co.*; (2) and the charterer was justified in his refusal to load

(1) 18 C. B. 144; 25 L. J. (C.P.) 209. (2) Law Rep. 10 C. P. 125, 144.

the vessel. If the charterer is compelled to load the vessel he will have no remedy against the shipowner, although the vessel may have been wrongfully put upon the register, whereas if this action is held not to be maintainable the shipowner will have a remedy against the Association if the vessel has been wrongfully taken off the register.

C. Russell, Q.C., and *French*, for the plaintiff, were not called upon.

BRAMWELL, L.J. I am of opinion that the judgment should be affirmed. I have no doubt that this is a clear case. I should think this statement is a warranty that the vessel is classed A $1\frac{1}{2}$. Mr. Herschell said that it is a warranty that the vessel is so classed, and will continue so classed, till she gets off her class; and he also said that it is a warranty that she is so classed, and rightly so classed. To put these constructions upon the warranty would be unreasonable. If we look at the charterparty the shipowner cannot be made liable in this action. The facts are that the shipowner knew no more of this matter than did the charterer; he did not know the rules of the American and Foreign Shipping Association, or what ships they thought fit to put on or to take off the register. The question is, what is the reasonable expansion of this warranty? It is, I think, that the shipowner warrants that the American and Foreign Shipping Association, having satisfied themselves by such means as they thought fit as to the condition of the ship, have put her on the register, and that she is there as such, but the shipowner does not say that they will not change their minds, and rightly or wrongly take her off. It seems to me impossible to hold that there is an undertaking on the part of the shipowner that the vessel shall continue on the register; that cannot be, because if she were taken off, the shipowner has broken his warranty, and most important questions would arise, for if Mr. Herschell is right, the insurance on the ship would be void, and the insurance on the goods would also be void; the peril, therefore, of holding, as Mr. Herschell wishes us to hold, would be greater than holding the other way. Mr. Herschell's argument also was, that if the Court decided against the charterer, and he had to load the vessel, he would have no

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remedy, but that the shipowner would have a remedy against the American and Foreign Shipping Association if his vessel was wrongfully taken off the register. I do not think any action would lie against them; they did not undertake absolutely that they would arrive at a right conclusion as to the condition of a vessel in every case, but only that they would use due diligence to do so. I cannot but think the mischief is great whichever construction is adopted, but it is a misfortune. The charterparty has been entered into upon the supposition that the vessel was on the register classed A 1½, and the warranty is only that she is on the register classed as A 1½ at the time of making the charterparty. It was also said during the argument that the proceedings at New Orleans annulled the classification. The ship was on the register as of the class described, and as a fact that is still true; a fact cannot be annulled. The engagement is "this vessel at the time of the charterparty is on the American and Foreign Shipping Book," that is all. The judgment of the learned judge was right, and the appeal must be dismissed.

BRETT, L.J. I am of the same opinion. The question is one solely of construction, and whatever hardship there may be, we have only to construe the written instrument, which in its terms is elliptical. The document states "A 1½ Record of American and Foreign Shipping Book." Now, the ordinary meaning of that language is that it refers to the ship, and that she is, at the time of entering into the charterparty, registered as A 1½. The document further speaks of the ship newly classed as above; that relates to what has been done in the book of the American and Foreign Shipping. I am of opinion that the words amount, not only to a warranty, but to a condition, as to the vessel's classification at the time the charterparty was made, and that they must be construed in their grammatical and natural sense; they cannot be added to. No doubt the meaning of words may be extended by custom, if consistent with the written instrument, but here the words are plain, and no addition can be made to them; construing them according to their grammatical meaning, it is a statement as to the actual registration of the vessel. The only argument that can be urged on behalf of the defendant is

the argument which was urged in *Hurst* v. *Usborne* (1) unsuccessfully, that it is a continuing warranty, and therefore it must be taken to be a statement that the vessel would continue to be of the same class that she was at the time the charterparty was made. Mr. Herschell proposes to add to the statement; he says that the words are to be construed, not merely that she is newly classed, but that she will continue to be of the same class as she was at the time the charterparty was made; but that construction would refer to the future, whereas the words of the charterparty only refer to the present. If the words suggested were added by implication, the shipowner, no doubt, would have failed to offer a proper ship; but that construction adds to the meaning, and if adopted, the shipowner would have warranted, not only the description of the vessel at the time of the charterparty, but he would have made himself liable for the acts of the authorities at New Orleans, over whom he had no control. It is quite clear that we ought to adhere to the words of the charterparty, and give to them their ordinary meaning. The charterparty contains, as a fact, a statement that the ship is A 1½ Record of American and Foreign Shipping at the time the charterparty was made.

COTTON, L.J. I am of the same opinion. The defendant relies upon the words "A 1½ Record of American and Foreign Shipping Book." That amounts to a warranty, and what is its meaning? I except the case of fraud; its meaning then comes to no more than this, that at the time the charterparty is made the vessel is A 1½, &c; not that she will continue so, because that would cover a wrongful act of the American Association, if they wrongfully took the vessel off the register. It was said during the argument, that the classification having been cancelled, it is as if the registration of the vessel has never existed. I cannot accede to that. The ship was on the register, and was taken off, for aught that appears, by the wrongful act of some third party; that cannot make the classification as if it had never existed. What has taken place between the shipowner and the American Association does not render the statement in the charterparty void as against the charterer.

(1) 18 C. B. (N.S.) 144; 25 L. J. (C.P.) 209.

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I am also of opinion that no terms can be imported into the contract, and that the contention that the warranty is a continuing one cannot be supported, and that the appeal must be dismissed.

Judgment affirmed.

Solicitors for plaintiff: *R. Smith, Williams, & Quiggin, Liverpool.*

Solicitors for defendants: *Haigh & Sons, Liverpool.*

[IN THE COURT OF APPEAL.]

March 1.

HURDMAN *v.* THE NORTH EASTERN RAILWAY COMPANY.

Action for Injury caused to an Adjoining Occupier—Owner of Land, Duty of—Negligence—Water, Percolation of.

11 C.L.D. 783

A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:—

Held, upon demurrer, that the statement of claim disclosed a good cause of action.

APPEAL from the judgment of Manisty, J., in favour of the plaintiff on demurrer to a statement of claim.

Claim:—At the time of the damage hereafter mentioned the plaintiff was, and is still, possessed of a house, No. 16, Lodge Terrace, Sunderland.

2. The defendants then were, and still are, possessed of a certain close of land adjoining the house of the plaintiff.

3. The defendants placed and deposited in and upon the close of the defendants, and upon and against a wall of the defendants which adjoins and abuts against the house of the plaintiff, large quantities of soil, clay, limestone, and other refuse, close to and adjoining the house of the plaintiff, and thereby raised the surface of the defendants' land above the level of the land upon which the plaintiff's house was built.

4. The rain which fell upon the soil, clay, limestone, and other refuse so placed as aforesaid oozed and percolated through the wall of the defendants into the house of the plaintiff, and the plaintiff's

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house thereby became wet, damp, unwholesome and unhealthy, and less commodious for habitation.

5. By reason of the acts of the defendants the walls of the house of the plaintiff became and were very much injured, and the paper upon the walls has been destroyed.

6. In the alternative the plaintiff alleges that the defendants negligently and improperly placed and deposited the soil, clay, limestone, and refuse upon the defendants' land, and that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged as before mentioned.

7. In the alternative the plaintiff alleges that the defendants were guilty of negligence in this, that the wall of the defendants against which the defendants so placed the soil, clay, limestone, and refuse was not sufficiently and properly constructed and built so as to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through the wall and into the plaintiff's house, and that the defendants were guilty of negligence in placing the soil, clay, limestone, and refuse against the wall being so insufficient to prevent the water falling upon the soil, clay, limestone, and refuse from oozing and percolating through and into the plaintiff's house, whereby the plaintiff's house was damaged.

Demurrer to the claim, on the ground that the acts, matters, and things alleged to have been done by the defendants do not give rise to any right of action on the part of the plaintiff.

Feb. 8, 9. *Herschell, Q.C.*, and *G. Bruce*, for the defendants in support of the demurrer. The statement of claim discloses no cause raised the soil of their own land, within their own boundary wall; that the plaintiff has built his house against the defendants' of action. The plaintiff's complaint is that the defendants have wall, and that the rain falling on the defendants' soil so raised oozes through the defendants' wall and runs on to the plaintiff's land and causes damp to his house. The question then is, what duty is there on the defendants not to do the acts, on their own land, of which the plaintiff complains. This is not a case where filth, or water has been collected in an artificial reservoir and then let loose, but the alleged injury is caused by the natural rain-

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fall percolating into the plaintiff's land. The claim is first set out without negligence, and then it alleges negligence, but in no way can the plaintiff impose a duty on the defendants, not even by alleging negligence. The plaintiff is seeking to put a limitation on an owner as to the manner in which he shall use his land. *Fletcher* v. *Rylands* (1) has no application; the case most analogous to the present is *Wilson* v. *Waddell* (2). There the plaintiff and defendant owned coal mines under their respective land. The coal in the defendant's mine cropped out to the surface of the defendant's land, and as each had worked out his mine there was a free communication under ground between the land of the plaintiff and the defendant. By reason of the minerals being near the surface in the defendant's mine, the surface sunk, making large fissures, so that the rain, which before had fallen on an impervious bed of clay forming a water-tight roof over the land, made its way into the fissures and so fell through into the defendant's mine and then ran down into the plaintiff's mine. The plaintiff's contention was that the defendant had interfered with the natural condition of the surface of his land, which by its natural drainage carried off the water, and had thereby let the water come down into the plaintiff's mine and injured him. The House of Lords held that as the rain which fell upon the land had merely percolated and gravitated in a different way from that in which it would if the surface had been left unchanged, the plaintiff had no right of action; that the defendant had a right to use his land as he pleased, and that a servitude to prevent such an user must be founded on something more than mere neighbourhood. If the defendants had made a defined flow of water into their neighbour's land that might give a cause of action, but the distinction is that where water flows on to the adjoining land merely by natural gravitation there is no cause of action. *Baird* v. *Williamson* (3), *Smith* v. *Fletcher* (4), and *Crompton* v. *Lea* (5), are cases of the diversion of streams running in defined channels. Even if water was artificially collected and escaped by vis major so as to injure an adjoining owner, no compensation can be obtained for the

(1) Law Rep. 3 H. L. C. 330.
(2) 2 Ap. Cas. 95.
(3) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.
(4) Law Rep. 9 Ex. 64.
(5) Law Rep. 19 Eq. at p. 126.

injury: *Nicholls* v. *Marsland* (1). *Broder* v. *Saillard* (2) is not an authority against the defendants, although it may contain some dicta which are adverse to them.

In paragraph 6 the word "negligently" is used, but unless a duty is shewn to exist the breach of which gives a cause of action, the mere use of the word "negligently" carries the case no further. The defendants had a right to put the soil on their own land; it is difficult to understand how a man can do a thing negligently on his own land, but even assuming it was negligently done, that will not avail the plaintiff; the mere allegation that the act was done negligently is not sufficient: *Gautret* v. *Egerton* (3); *Brine* v. *Great Western Ry. Co.* (4) Neither does paragraph 7 shew any cause of action; in that paragraph the plaintiff complains that the defendants were guilty of negligence in not building a wall on their own land, of sufficient thickness to keep the water which falls on the defendants' land from percolating into the plaintiff's land. No such duty can be imposed on the defendants.

Feb. 11. *Waddy, Q.C.*, and *John Edge*, for the plaintiff, contrà. Paragraphs 6 and 7 disclose a good cause of action. *Gautret* v. *Egerton* (5) has no application. The principle on which that case was decided is, that where a man comes on to another's land without invitation and he is injured he has no cause of action. *Wilson* v. *Waddell* (6), chiefly relied on for the defendants is also inapplicable. The question there decided was that the right to work mines is a right of property which when duly exercised begets no responsibility. The defendant in that case was making a natural use of his land which caused the subsidence; but in the present case the raising of the surface in the defendants' land was an artificial erection, and if in consequence more water than was wont flows into the adjoining land and causes an injury an action lies. The cases cited on behalf of the defendants relate to mining, and the principle on which they rest is explained in *Crompton* v. *Lea*. (7) It is there said, "The party

(1) Law Rep. 10 Ex. 255.
(2) 2 Ch. D. 692.
(3) Law Rep. 2 C. P. at p. 374.
(4) 2 B. & S. 402.
(5) Law Rep. 2 C. P. 371.
(6) 2 Ap. Cas. 95.
(7) Law Rep. 19 Eq. at p. 126.

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who has got the mine in the dip must take the risk of the water flowing when the mining operation is going on in a regular way. Every one has a right to use his land or his mine and make the most of it, subject ordinarily to the rule that he must use his property so as not to injure his neighbour. Ordinarily he is bound to take care that nothing wanders from his property on to his neighbour's so as to injure him. But in applying that qualification of the ordinary rule it is well settled that the case of underground water flowing from ordinary and proper mining operations does not come within it, and therefore the lower proprietor must take subject to the risk. That is what cases like *Smith* v. *Kendrick* (1) decide. On the other hand, *Baird* v. *Williamson* (2) is an example of a case of a different kind, where it is said, 'If you do work you must only work in the ordinary proper and skilful way, and must not accumulate a mass of water, and then throw that water in a mass on the proprietor whose mine is lower down.' . . . In respect of that an action will lie." The case which most nearly resembles the present is *Broder* v. *Saillard* (3), and is an authority in favour of the plaintiff. There the plaintiff and defendant were adjoining occupiers; the defendant's stable was erected on a mound of made earth, which caused the damp to percolate through the wall of the plaintiff's house, and it was decided that in whatever way water, whether from rain or otherwise, is caused to flow on to a neighbour's land by means of an artificial work, the owner may maintain an action for any injury sustained by him. *Acton* v. *Blundell* (4) and *Chasemore* v. *Richards* (5) are cases relating to the flow of water underground, and are governed by a rule of law which has no application to the present case.

Herschell, Q.C., in reply.

Cur. adv. vult.

March 1. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

COTTON, L.J. In this case the plaintiff has brought an action

(1) 7 C. B. 515; 18 L. J. (C.P.) 172.
(2) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.
(3) 2 Ch. D. 692.
(4) 12 M. & W. 324.
(5) 7 H. L. C. 349.

for injury alleged to have been caused to his house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question therefore is whether that alleges a good cause of action. [The Lord Justice read the statement of claim, except paragraph 7.] It is unnecessary to read the seventh paragraph, because it is based on a supposed obligation of the railway company to make their wall water-tight, but in our opinion there is no such obligation, and if the statements contained in the preceding paragraphs do not shew a cause of action, the statements of the seventh paragraph do not enable the plaintiff to sustain this action.

For the purposes of our decision, we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that rain-water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, admitting this statement to be true, liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against any one who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder* v. *Saillard*. (1) I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbour's property,

(1) 2 Ch. D. at p. 700.

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and for causing by artificial means things in themselves inoffensive to pass into a neighbour's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's own land (as building so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable, even though they interfere with a neighbour's enjoyment of his property. But it is urged that this is at variance with the decision that if, in consequence of a mine-owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine-owner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled), is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land. That this is the principle of these cases appears from the case of *Wilson* v. *Waddell* (1), and from what is said by the Lord Chancellor in *Fletcher* v. *Rylands.* (2) Moreover, the cases referred to have laid down that a mine-owner is exempt from liability, for water which in consequence of his works flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner; and in the present case it is stated that the defendants have conducted this operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mine-owners, do not enable the defendants to discharge themselves from liability.

It was also argued that a land-owner, who by operations on his own land drains the water percolating underground in the property of his neighbour, is not liable to an action by the man whose land is thus deprived of its natural moisture, and this it was argued

(1) 2 Ap. Cas. 95. (2) Law Rep. 3 H. L. C. 330.

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was inconsistent with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognises his title, and the law does not recognise any title in a landowner to water percolating through his property underground and in no definite channel.

We are of opinion that the maxim "sic utere tuo ut alienum non lædas" applies to and governs the present case, and that as the plaintiff by his statement of claim alleges that the defendants have by artificial erections on their land caused water to flow into the plaintiff's land, in a manner in which it would not but for such erection have done, the defendants are answerable for the injury caused thereby to the plaintiff.

Judgment affirmed.

Solicitors for plaintiff: *Wright & Pilley, for Tilley, Sunderland.*

Solicitors for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

BATH, APPELLANT; WHITE, RESPONDENT.

Jan. 25.

Licensing Act, 1872, 35 & 36 *Vict. c.* 94, *s.* 5—*Sale of Beer by a Person not licensed to sell the same to be drunk on the Premises.*

The defendant, a person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it and carried it across the highway to the cottage of one S., about fourteen yards from the defendant's premises, and handed the jug to S., who was standing in his own garden. S., having drunk some of the beer, returned the jug over the wall to Y. and others, who also drank of it standing on the pathway close to the wall. The jug was re-filled two or three times, and the beer drunk in the same way. The defendant received the money for the beer on each occasion, and saw or might have seen what was going on:—

Held, that this evidence did not justify a conviction of the defendant under 35 & 36 Vict. c. 94, s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller."

CASE stated by justices for the county of Wilts under 20 & 21 Vict. c. 43.

An information, under s. 5 of the Licensing Act, 1872, was

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preferred by the respondent against the appellant, charging that J. Sawyer and I. York did purchase certain intoxicating liquor, to wit, two quarts of beer, from E. Bath (the appellant), beerhouse keeper, who was not then licensed to sell the same to be drunk on the premises, and did unlawfully drink the said liquor on a certain highway adjoining or near such licensed premises, with the privity of the appellant, was heard and the appellant convicted.

The facts deposed to were as follows. The appellant held a licence to sell beer to be drunk off the premises, and was not a licensed victualler. On the 1st of September, 1877, about two o'clock in the afternoon, a police-constable saw the appellant with two men named Sawyer and Clark standing outside the appellant's front door. Sawyer was sent to fetch a jug from a cottage near, which he took inside the house, and shortly after came out with it filled with liquor, which he took to the opposite side of the road and commenced drinking in company with several other persons. The witness then went over and asked to partake of the liquor. He drank some, and found it was beer. Close to the spot where Sawyer and the others were standing was a wall which divides the public footpath from the garden of a man named George Sheppard. The beer was handed over the wall to Sheppard. The space between the front of the appellant's house and Sheppard's wall is the public highway leading from Melksham to Bath, through the village of Atworth. The width of the road and footpath was about ten yards. Sheppard and his wife partook of the beer over their garden wall, and did not leave their premises. Sawyer, a man named York, Clark, and Cottell, and several others, remained on the footpath drinking. During the whole time the witness was present, the appellant remained outside her house about three or four yards into the road looking at the men on the opposite side and passing remarks to the witness. When the jug was empty, it was taken by York to the appellant standing at her front door. He asked her for another quart, and he (witness) heard her say to York, "Who is going to pay for it?" The appellant's servant Elizabeth Watts took the jug inside, and brought it back again full of liquor, and handed it to York, who drank from it. When Elizabeth Watts handed the jug to York, he gave the appellant something which he (the witness) believed

to be money. After waiting about twenty minutes, the witness left, and when he left the men were still drinking on the pavement, and the appellant was still standing outside her house.

In cross-examination the witness further stated, that the jug was not fetched from Sheppard's wall; that the men did not drink until they got over the gutter on the other side of the road; that the appellant did not enter her house the whole time he was there, but remained outside; that, when the jug was filled the second time, York drank out of it almost in the centre of the highway.

This was all the evidence tendered on the part of the respondent; and it was contended on behalf of the appellant,—1. That, upon the facts stated, no offence was committed within the meaning of the 5th section of the Licensing Act, 1872; and three witnesses were called, viz. George Sheppard, Isaac York, and Elizabeth Watts.

Sheppard stated that, on the 1st of September, he handed York a jug from his own house, and gave him money with directions what to do with it; that at the time he did so, he was in his own garden, which is opposite the appellant's house; that, according to his directions, he saw York go with the jug to the appellant's house, and afterwards he brought the jug filled with beer to him; that he watched York the whole time, and was certain he did not drink any of the beer in the road before handing the jug to him over his wall into his garden; that he (the witness) drank some of the beer, and invited several friends who were present to drink some; that York afterwards had the jug re-filled at his own expense, that the appellant had no control over any of their actions, and did not carry on a conversation with any of the party. On cross-examination, the witness stated that he saw Elizabeth Watts once or twice, but did not see her do anything; that the drinking occupied about half-an-hour; that the main part of the beer was drunk in the garden; and that Sawyer and York stood on the pavement outside his garden when they drank.

York stated that Sheppard gave him a jug and the money to pay for the beer; that he went across to Mrs. Bath's for the beer; that it was drawn for him by Elizabeth Watts, and paid for over the counter; that Sheppard was standing in his own garden about

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fourteen yards from the appellant's door; that he (the witness) gave the beer to Sheppard, who drank first; that Sheppard handed the jug back over the wall, and asked him to drink; that he (the witness) drank close to the wall of the garden; that the appellant was not there; that he did not see her till he fetched the other quart; that Elizabeth Watts drew the beer, and he (the witness) paid for it, and also for two ounces of tobacco; that he took it to Sheppard; that he did not tell the appellant where he was going to take it; and that she was then in the parlour at the back of the shop, and could not see Sheppard's premises.

This evidence was corroborated by Elizabeth Watts, assistant to the appellant.

The appellant herself was not called.

The justices being of opinion that, upon the evidence before them, the intoxicating liquor was purchased by Sawyer and York from the appellant or from her servant Elizabeth Watts, and was drunk upon the highway upon adjoining or near the appellant's premises, and that such drinking was with the privity of the appellant within the intent and meaning of the 5th section of the Licensing Act, 1872, gave their determination against the appellant as before stated.

Finlay, for the appellant. There was no reasonable evidence to warrant this conviction. The question turns upon sect. 5 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). (1) This section was probably framed to meet the difficulty which arose in *Deal* v. *Schofield*. (2) The defendant there was a person licensed to sell beer not to be drunk on the premises: his servant handed beer in a mug of the defendant's through an open window of the defendant's premises to a person who, after paying for it, drank it

(1) 35 & 36 Vict. c. 94, s. 5, enacts that, "if any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises, drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privity or consent," be liable to certain penalties; and that, "for the purposes of this section, the expression 'premises where the same is sold' shall include any premises adjoining or near the premises where the liquor is sold, if belonging to the seller of the liquor or under his control, or used by his permission."

(2) Law Rep. 3 Q. B. 8.

immediately standing on the highway as close as possible to the window: and it was held that this evidence did not justify a conviction of the defendant under 3 & 4 Vict. c. 61, s. 13 (1), for "selling beer to be consumed on the premises where sold." The facts in the present case shew that the appellant had committed no offence. She could exercise no control over those who consumed the beer; and, even if they had been guilty of an infraction of the law, there is no evidence that it was done with her privity or consent. The beer on each occasion was consumed by Sheppard and his friends, they being either in his garden or upon the footpath immediately against his wall, which was about fourteen yards from the appellant's premises. It can make no difference that the person who fetched the beer on one of those occasions may have tasted it whilst crossing the highway.

No counsel appeared for the respondent.

LINDLEY, J. I have come to the conclusion that the conviction in this case ought to be reversed, on the ground that there was no reasonable evidence that there was a sale of the beer by the appellant "to be drunk on her premises, or on any highway adjoining or near to such premises, with her privity or consent." She had a perfect right to sell beer to be carried to Sheppard's cottage, and she is not to be held responsible for what he did with it. Instead of inviting his friends into his garden to drink the beer, he thought fit to hand it to them over the wall. If the magistrates proceeded upon the ground that the appellant knew that the beer was to be drunk upon the highway adjoining her premises, I think there is no evidence to support their conviction. The word "knowledge" is not used in the Act. The first transaction was clearly a bonâ fide sale of the beer to be consumed off the premises; and the subsequent transactions were a mere continuation of the first. If the evidence had clearly shewn that the appellant was conniving at the drinking on the highway near her premises, the conviction might have been sustained. But I am by no means satisfied that it does so. There is nothing to shew

(1) 3 & 4 Vict. c. 61, s. 13, enacted that, "if any person shall sell beer, &c., to be consumed in or upon the house or premises where sold, without being duly licensed so to do, such person shall, in addition to any excise penalty to which he may thereby become subject, forfeit 5*l.*," &c.

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that she knew what was to be done with the beer. If it could have been shewn that she knew it was to be drunk on the highway "near to or adjoining her premises," and wilfully shut her eyes to the fact, then it might be said to have been done "with her privity or consent," and a conviction might have been sustained. But the facts disclosed upon this case clearly do not warrant the conclusion.

LOPES, J. Having regard to the whole of the facts laid before us, I do not think there is any reasonable evidence of a violation of the Act by the appellant.

Conviction quashed.

Solicitor for appellant: *T. H. Harwood, for J. G. Wilton, Bath.*

March 21.

GRANT *v.* HOLLAND. ROSS *v.* GRANT.

Practice—Changing Solicitor—Judicature Act, 1873 (36 & 37 *Vict. c.* 66) *s.* 25, *sub-s.* 11.

The rule at law as well as in equity, since the passing of the Judicature Acts, 1873 and 1875, is, that an order for changing a solicitor shall be made without any provision as to the payment of the solicitor's costs.

ON the 11th of March, 1878, a summons was taken out on behalf of Mr. Grant, calling upon Mr. Edwin Norton to shew cause why Messrs. Harrison, Beal, & Harrison should not be appointed solicitors for him in this action in his stead. Upon this summons the master made an order, "on payment of Mr. Norton's costs of the action." A summons was then taken out to vary the order of the master "so far as regards Mr. Norton's costs." This summons was heard before Field, J., on the 12th of March, when the learned judge made an order that "Messrs. Harrison, Beal, & Harrison should be appointed solicitors for the defendant in place of the said Mr. Norton, without any condition," stating that he had satisfied himself by inquiry that the order was in accordance with the practice in equity.

Sir H. Giffard, S.G. (with whom was *Lumley Smith*), moved

that the last-mentioned order might be rescinded or varied. At common law, neither party in a cause could change his attorney without first obtaining the leave of the Court or the order of a judge for that purpose; and such leave would not be granted until the party applying for it had actually paid or undertaken to pay the attorney's bill as taxed by the proper officer: *Macpherson* v. *Rorison* (1); *Twort* v. *Dayrell* (2); Hullock on Costs, 523; Reg. Gen. Hilary Term, 1853. In *Witt* v. *Ames* (3) it was held by the Court of Queen's Bench that it is the invariable practice of the Court not to allow the attorney on the record to be changed unless the costs of the first attorney have been paid, and that the fact that such attorney has other sufficient security for his costs is no reason for departing from that rule. A different rule seems to have prevailed in equity, where the solicitor's lien upon the papers or the proceeds of the suit seems to have been considered a sufficient security: see Daniell's Chancery Practice, 5th ed. 379, 1723, 4, 5; Seton on Decrees, 3rd ed. 854 and 855; 4th ed. 637. Reliance will probably be placed upon s. 25, sub-s. 11 of the Judicature Act, 1873, which provides that "Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." That, however, means the *principles* of equity, and not the rules regulating the practice and procedure of the Courts. The reason for the rule which prevails in equity in this respect probably is that there is usually a fund in Court available for the solicitor's protection. Sect. 87 of the Judicature Act, 1873, expressly enacts that solicitors, attorneys, and proctors "shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if the Act had not passed."

J. C. Mathew, contrà. At common law, no doubt, it was not usual to change the attorney without making provision for his costs. The cases referred to shew that it is equally clear that the rule in equity was to leave the solicitor to his ordinary remedy,—reserving to him his lien upon the papers as well as his right to apply to the Court for protection. The solicitor here is not asked

(1) Doug. 217. (2) 13 Ves. 195. (3) 11 W. R. 751.

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to deliver up the papers. There being, then, this conflict, the rule of equity must prevail. This is as much a principle of equity as the rule relating to the discovery and inspection of documents, which was held in *Bustros* v. *White* (1) to be within the operation of s. 25, sub-s. 11 of the Judicature Act, 1873.

HUDDLESTON, B. I am of opinion that the order of my Brother Field must be upheld, and this appeal dismissed. The first question is, what has been the practice at common law as to payment of costs on a change of attorneys. In Chitty's Forms, 11th ed. p. 91, it is said, "The order is usually drawn up on payment of the attorney's bill in the action, to be taxed by the master." In Lush's Practice, 3rd ed. 253, the rule is stated as follows: "In general, an attorney is entitled to be paid his costs before he can be removed; and it was formerly a good answer to an application for leave to change that his bill was unpaid. Now, however, the order is frequently drawn up conditionally, on payment of his costs; but without such condition it will not be made, though the attorney has security. The Rule [of Hilary Term, 1853], it will be observed, makes no mention of such a condition, and there appears to be no decision on the point whether the outgoing attorney is entitled to be paid his whole demand, or only the costs in that particular suit,"—citing, amongst other cases, *Witt* v. *Ames* (2), which is a distinct authority, that "it is the invariable practice not to permit the attorney to be changed unless his costs are paid." We must therefore take it to have been fairly settled at common law that the attorney was entitled to be paid his costs, at all events in the particular suit, before he could be dismissed. The next question is whether it was the invariable practice of the Court of Chancery to draw up the order for changing the solicitor without any mention of costs. The Orders under the Judicature Act, 1875, are as silent on the subject as is the 4th of the common law rules of Hilary Term, 1853. The forms given in Seton on Decrees are equally silent: and I gather from the text-books that it is not usual on the equity side to order the payment of costs. The absence of the mention of costs in no way interferes with the solicitor's lien upon any fund in Court or

(1) 1 Q. B. D. 423. (2) 11 W. R. 751.

upon the papers in the cause. There is, then, a distinct conflict between the rule of law and the rule of equity in this respect; and the general scope of the Judicature Acts, 1873 and 1875, is that law shall cede to equity. Section 25 of the Act of 1873 is expressly framed with that view; sub-sections 1 to 10 point out the most glaring instances of conflict between the two systems, such as the administration of assets of insolvent estates, the claims of cestui que trust against his trustee (as to which the Statute of Limitations operated as a bar at law but not in equity), the distinction between legal and equitable waste, &c.; and then comes this sweeping provision,—"Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail." That being so, it follows that the solicitor may in all cases be changed without any provision being made in the order for the payment of his costs. The Solicitor General says that this will contravene the provision of s. 87, which provides that solicitors "shall, as far as circumstances will permit, be entitled to the same privileges and be subject to the same obligations as if this Act had not passed." That, however, I apprehend to mean no more than that their privileges as to freedom from serving certain offices, the right to sue in their own courts, &c., shall still be secured to them. It never could have been intended to apply to a matter which is the right of the suitor. I think the order of my Brother Field should be upheld, and this application dismissed with costs.

LINDLEY, J. I am of the same opinion, being satisfied partly by the inquiries which I understand were made by my Brother Field, my own recollections of what was the practice in Equity, and the absence of all mention of costs in the forms given in Seton on Decrees. The question, then, is reduced to the construction of sub-s. 11 of s. 25 of the Judicature Act, 1873, which provides that in all matters in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail. I do not know why the practice with regard to the changing

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of solicitors should not be a "rule of Equity." The general scope of the Judicature Acts is that there should be one uniform administration of justice in the High Court of Justice, as was laid down by the Court of Appeal in *Bustros* v. *White*. (1) Unless there be something to preclude it, the rules of Equity are in all cases to prevail. The 87th section means to preserve to solicitors as a body the privileges which they formerly enjoyed. This is not a privilege enjoyed by the general body, but a matter which only affects the right of the solicitor in the individual case. It follows that, in future, the order for changing the solicitor in a suit at law must be the same as that formerly used in Chancery.

Motion dismissed, with costs.

Solicitors for plaintiff: *Lawrence, Plews, & Baker.*

Solicitors for defendant: *Edwin Norton; Harrison, Beal, & Harrison.*

March 8.

WISEMAN *v.* BOOKER.

Railway Company—Fencing Land taken for the Railway from the adjoining Lands not taken—8 & 9 *Vict. c.* 20, *s.* 68.

A railway company let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence passed their heads through and over it and did damage to the tenant's crops:—

Held, that, the duty of fencing being by 8 & 9 Vict. c. 20, s. 68, imposed upon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle.

APPEAL from a judgment of the county court of Kent holden at Gravesend.

The plaintiff claimed 7*l.* 14*s.* 4*d.* as damages sustained by him in consequence of two horses of the defendant having eaten vegetables of the plaintiff growing upon a piece of land at Northfleet, the property of the South Eastern Railway Company and let by them as after mentioned. At the trial the following facts were proved or admitted:—

The South Eastern Railway Company some years since, under

(1) 1 Q. B. D. 423.

the powers of their special Acts, incorporating the Companies Clauses, the Lands Clauses, and the Railways Clauses Consolidation Acts, 1845 (1), took the piece of land in question and other lands for the purpose of constructing their railway by cutting through such lands; and, after the railway was constructed, the piece of land in question, which is a narrow strip situate at the top of and running along the side of the cutting, which was not needed for the purposes of the railway, was separated by an open post-and-rail fence four feet high from the adjoining land in the occupation of the defendant; and at the commencement and during the continuance of the grievances complained of by the plaintiff, this open post-and-rail fence was the only fence between the adjoining land in the occupation of the defendant and the railway and piece of land in question.

The railway company not requiring to use the piece of land in question let it to the plaintiff's father, who planted it with vegetables. The plaintiff bought the growing crops from his father.

From August, 1875, to May, 1876, the defendant turned out two horses to graze on the land adjoining the company's land, and the horses by putting their heads over or through the post-and-rail fence ate divers of the vegetables of the plaintiff, to the agreed value of 5*l.* 1*s.*

The defendant contended that the railway company, under s. 10 of the Railways Clauses Act, 1845 (2), were bound, for the accommodation of the defendant, being the occupier of the adjoining land, to supply and maintain sufficient posts, rails, &c., or other fences for separating the piece of land in question from

(1) 8 & 9 Vict. cc. 16, 18, 20.

(2) By s. 68 of the Railways Clauses Consolidation Act, 1845, it is, amongst other things, enacted that, "The company shall make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway, sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such land from trespass or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require; and the said other works as soon as conveniently may be."

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the defendant's land adjoining not taken by the company, and preventing the cattle of the defendant, the occupier of the adjoining land, from straying out of the adjoining land into the land let by the company as above mentioned; and that the open post-and-rail fence four feet high placed by the company between the piece of land in question and the adjoining land occupied by the defendant was not a sufficient fence for that purpose, since the defendant's horses were not thereby prevented from putting their heads over or through the fence and eating the crop of vegetables of the plaintiff; and that the plaintiff stood in the same position as if the crop of vegetables had been the property of the railway company, and therefore that the defendant was entitled to judgment.

The judge decided that, if material as between the plaintiff and defendant in the present action, the obligation cast upon the railway company by 8 & 9 Vict. c. 20, s. 68, to supply and maintain sufficient posts, rails, or other fences, &c., did not apply to the case of cattle putting their heads over or through such fences and eating the crops on such last-mentioned land; and that the doing so was not "straying on to such last-mentioned land" within the meaning of the enactment. The defendant, therefore, in the opinion of the judge, being under the circumstances bound at common law to keep his horses from injuring the plaintiff's crops, he gave judgment for the plaintiff.

The questions for the opinion of the Court were,—first, whether or not the company were bound, for the accommodation of the defendant, the occupier of the adjoining land, to supply a fence of sufficient height and thickness to prevent the defendant's horses putting their heads over or through the same and eating the crop of vegetables growing on the land taken for the purposes of the railway,—secondly, if they were so bound, whether their not having done so was or was not a good defence to the action brought by the plaintiff, who, though not the tenant of the piece of land in question belonging to the railway company, was the purchaser of the crops growing thereon,—thirdly, whether under the circumstances stated, if the 8 & 9 Vict. c. 20, s. 68, was inapplicable, the defendant was bound to prevent his horses eating the plaintiff's crops.

Tennant, for the defendant. The duty of fencing so as to separate the land taken for the use of the railway from the adjoining lands not taken, and preventing the cattle of such adjoining owners from straying thereout, being by s. 68 of 8 & 9 Vict. c. 20 cast upon the railway company under whom the plaintiff claims, the defendant cannot be responsible for damage caused to the plaintiff through the insufficiency of such fences: see *Ricketts* v. *East and West India Docks and Ry. Co.* (1); *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis.* (2) [*Wilson* v. *Newberry* (3), where the plaintiff's horses were poisoned by eating clippings from yew trees growing on the defendant's adjoining land, and *Ellis* v. *Loftus Iron Co.* (4), where the plaintiff's mare was injured by being kicked and bitten by a horse in an adjoining field of the defendant, by reason of the insufficiency of a fence which the latter was bound to maintain, were also referred to.]

Buck, for the plaintiff. Apart from any question of neglect of duty on the part of the railway company, here was an act of trespass on the part of the defendant's horses for which, according to the judgment of Lord Coleridge in *Ellis* v. *Loftus Iron Co.* (5), the defendant was clearly liable. That judgment was founded mainly upon *Lee* v. *Riley.* (6) There, through defect of fences which it was the defendant's duty to repair, his mare strayed in the night time from his close into an adjoining field, and thence into a field of the plaintiff's in which was a horse; from some unexplained cause, the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare which broke his leg, and he was necessarily killed: and it was held that the defendant was responsible for his mare's trespass.

[LOPES, J. Suppose the plaintiff had been bound by prescription to repair the fence in question, could he have brought trespass for damage done to his crops in consequence of the fence being so imperfect as to permit the defendant's horses to put their heads over or through it so as to reach them? And, were not the company liable to fence to the same extent?]

(1) 12 C. B. 160; 21 L. J. (C.P.) 201.
(2) 14 C. B. 213; 23 L. J. (C.P.) 85.
(3) Law Rep. 7 Q. B. 31.
(4) Law Rep. 10 C. P. 10.
(5) Law Rep. 10 C. P. 12.
(6) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

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The company are by the Act to provide sufficient fences for the protection of the adjoining land from trespass or to prevent the cattle of the occupiers from straying thereout. It is not found here that the fence was such as to invite the cattle to stray from the adjoining land of the defendant.

LINDLEY, J. I think the judgment of the county court judge in this case was wrong and must be reversed. The facts are simple. The defendant has land adjoining other land which had been taken by a railway company for the use of their railway, which land the company were bound to fence. The fence which they put up was of such a character as to allow the defendant's horses to pass their heads over and through it and eat and destroy the crops of vegetables planted near it by the company's tenant. Now, the 68th section of the Railways Clauses Consolidation Act, 1845, which imposes upon the company the duty of fencing, enacts in substance that the company shall make and at all times thereafter maintain sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting *such land* from trespass or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway. The language is a little ambiguous. But the fence is to be for the benefit of the owner or occupier of the adjoining lands. The structure is to be sufficient to keep the cattle of the adjoining owners from straying on to the land of the company. The horses here were straying within the fair meaning of those words; and this it was the duty of the company to prevent. Suppose the company had after erecting such a fence as here described planted yew trees so near to it as to be within reach of the cattle of the adjoining owner, and they had eaten and died, would not the company have been responsible for their loss within the principle of the decision in *Ellis* v. *Loftus Iron Co.?* (1) The plaintiff cannot be in a higher or better position than the railway company. The defendant cannot be made responsible for their breach of duty.

LOPES, J. I also think that the decision of the county court

(1) Law Rep. 10 C. P. 10.

judge was wrong. The action is brought in respect of the defendant's horses straying on land of the plaintiff and destroying his crops. The answer is that the damage was occasioned by defect of a fence which the defendant was under no liability to make and maintain, but the making and maintenance of which was a duty cast by the Act of Parliament upon the railway company, whose tenant the plaintiff may for this purpose be assumed to be. The liability cast upon the company by the Act is very much like the old prescriptive liability to fence. The judgment must be reversed, with costs.

Judgment for the defendant.

Solicitor for plaintiff: *Angove.*
Solicitors for defendant: *Scott, Jarmain, & Trass.*

BRYANT AND ANOTHER *v.* HERBERT.

March 2.

Detinue—Costs where Verdict under 20*l.—County Courts Acts,* 13 *&* 14 *Vict. c.* 61, *s.* 11; 19 *&* 20 *Vict. c.* 108, *s.* 10; 30 *&* 31 *Vict. c.* 142, *s.* 5.

Where the plaintiffs, in an action for the wrongful detention of a picture by the defendant, recovered a verdict for 10*l.* 1*s.*, being 10*l.* assessed by the jury as the value of the picture, and 1*s.* damages for its detention,—the judge having refused to make an order for the delivery up of the picture:—

Held, that, under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, the plaintiffs were not entitled to any costs.

ACTION claiming the return of a picture, or its value, and damages for its detention.

The cause was tried before Denman, J., at the last Michaelmas Sittings at Westminster. It appeared that the plaintiffs, who are picture-dealers, had bought a painting which purported to be by the defendant, a Royal Academician of repute; that, on the 30th of December, 1876, one of the plaintiffs took it to the defendant's house for the purpose of ascertaining whether or not it was genuine, and left it with him for examination, taking a receipt for it; that the defendant, finding the picture to be spurious, refused to restore it to the plaintiffs except upon the condition of their acknowledging it to be a forgery and consenting to erase his

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name from it; and that, the plaintiffs declining to accede to these conditions, the defendant detained the picture.

The jury assessed the value of the picture at 10*l.*, and the damages for its detention at 1*s.* The learned judge refused to order the picture to be delivered up to the plaintiffs, and directed a verdict to be entered for them for 10*l.* 1*s.*, and made no order as to costs.

The master having declined to tax the plaintiffs' costs, on the ground that, the action being founded on contract, and not on tort, the plaintiffs were under s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), disentitled to costs, not having recovered a sum exceeding 20*l.* (1) Application was then made to Field, J., at chambers, and he likewise refused to order a taxation. The plaintiffs appealed to the Court.

Feb. 26. *Finlay*, for the plaintiffs, submitted that, from the earliest time the action of detinue had always been considered to be an action founded on tort, and that the plaintiffs, having recovered a verdict for more than 10*l.*, were entitled to their costs. He referred to *Gledstane* v. *Hewitt* (2); *Walker* v. *Needham* (3); *Clossman* v. *White* (4); *Danby* v. *Lamb* (5); *Byrne* v. *M'Evoy* (6); *Pontifex* v. *Midland Ry. Co.* (7); Tidd's Practice, 9th ed. 5 and 11; 1 Chitty on Pleadings, 109.

H. Matthews, *Q.C.*, contrà, submitted that the action was clearly founded upon contract and not on tort, and that the 5th section of 30 & 31 Vict. c. 142, the words of which are substantially the same as those of s. 11 of 13 & 14 Vict. c. 61, must be read in pari materiâ with that enactment and receive the same construction. (8)

(1) 30 & 31 Vict. c. 142, s. 5: "If in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certifies on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

(2) 1 C. & J. 565.

(3) 3 M. & G. 557.

(4) 7 C. B. 43.

(5) 11 C. B. (N.S.) 423; 31 L. J. (C.P.) 17.

(6) 5 Ir. Rep. C. L. 568.

(7) 3 Q. B. D. 23.

(8) 13 & 14 Vict. c. 61, s. 11: "If in any action commenced after the passing of this Act in any of Her Majesty's

He referred to the following authorities,—Year Books, 11 H. 4, fo. 46; 6 H. 7, fo. 9; Brooke's Abridgment, *Detinue de Biens*, pl. 19, 36, 53, *Joinder of Actions*, pl. 97; Comyns's Digest, *Detinue* (D.); *Bishop* v. *Montague* (1); *Kettle* v. *Bromsall* (2); *Mills* v. *Graham* (3); *M'Manus* v. *Crickett* (4); *Whitehead* v. *Harrison* (5); *Clements* v. *Flight* (6); *Danby* v. *Lamb* (7); Addison on Torts, 4th ed. 452–464; 1 Chitty on Pleadings, 7th ed. 136; Broom's Commentaries, 118; *Baker* v. *Oakes* (8); and contended that the result of all the authorities was, that, whether the defendants' possession began lawfully or tortiously,—whether he received the goods wrongfully or became possessed of them by virtue of a contract to re-deliver them on request,—the plaintiffs had their election to waive the tort, and bring their action on the implied contract to re-deliver, the bailment (though formerly held to be a material allegation) not being traversable. He further contended that wager of law, which was not allowed in actions of tort, but only in actions of contract (1 Bla. Com. 15th ed. 345), was allowed in detinue; and that detinue was held to be within the Writ of Trial Act, 3 & 4 Wm. 4, c. 42, s. 17; *Walker* v. *Needham*. (9)

Finlay, in reply, referred to *Tattan* v. *Great Western Ry. Co.* (10); *Brinsmead* v. *Harrison* (11); Chitty on Contracts, 7th ed. 135; and Bullen and Leake's Precedents, 271; and submitted that, comparing the language of the several sections of the three County Court Acts on the subject,—13 & 14 Vict. c. 61, s. 11; 19 & 20 Vict. c. 108, s. 30; and 30 & 31 Vict. c. 142, s. 51—the fair inference was that the later enactment contemplated a different classification of

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superior Courts of record, in covenant, debt, *detinue*, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l*. . . . or . . . . in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l*., the plaintiff shall have judgment to recover such sum only, and no costs."

(1) Cro. Eliz. 824.
(2) Willes, 118.
(3) 1 N. R. 140.
(4) 1 East, 106.
(5) 6 Q. B. D. 423.
(6) 16 M. & W. 42.
(7) 11 C. B. (N.S.) 423; 31 L. J. (C.P.) 17.
(8) 2 Q. B. D. 171.
(9) 3 M. & G. 557.
(10) 2 E. & E. 844; 29 L. J. (Q.B.) 184.
(11) Law Rep. 6 C. P. 584.

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actions from that referred to in the earlier statute of 13 & 14 Vict. c. 61. He submitted that an action could not be founded on contract when the plaintiff could recover without alleging or proving any contract at all, but need only allege and prove his title to the thing detained and its unlawful detention by the defendant: and he referred to Schedule B to the Common Law Procedure Act, 1852, which passed after 13 & 14 Vict. c. 61, where detinue is classed amongst actions "for wrongs independent of contract."

Cur. adv. vult.

March 2. The judgment of the Court (Denman and Lindley, JJ.) was delivered by

DENMAN, J. The plaintiffs in this action had delivered to the defendant a picture in order that he might determine whether it was a genuine picture painted by himself or not. He, having come to the conclusion that it was not, refused to give it back to the plaintiffs, except upon conditions to which they would not agree. They accordingly brought an action against him for its recovery, and they obtained a verdict and judgment for 10*l.*, the value of the picture, and for 1*s.* as damages for its detention. The learned judge declined to make any order for the delivery up of the picture, though requested to do so by the plaintiffs' counsel, and made no order as to costs; and, therefore (under Order LV. of the Judicature Act, 1875) the plaintiffs, having succeeded in the action, are entitled to their costs, unless they are deprived of them by some statutory enactment.

The defendant contends that 30 & 31 Vict. c. 142, s. 5, deprives the plaintiffs of their right to costs, inasmuch as this action was founded on contract, and not on wrong, within the true meaning of that enactment; and the question which we have to decide is whether this contention is well founded or not.

We cannot give our decision without expressing our obligation to the learned counsel who argued the case, for their very learned and exhaustive argument on both sides.

In form, the plaintiffs' action was an action of detinue; in substance, it was for the wrongful detention of the property of the plaintiffs. It was strongly urged upon us that an action could not

be regarded as founded on contract when the plaintiff could recover in the action without alleging or proving any contract at all, and could succeed simply on alleging and proving their own title to the picture and its wrongful detention from them. This argument was moreover strengthened by the fact that in the Schedule B. of Forms to the Common Law Procedure Act, 1852, actions for detaining title-deeds are classed amongst actions for wrongs, as distinguished from actions on contracts.

In order, however, to put a proper construction on the section of the statute which we have to construe, it is necessary to bear in mind the prior legislation on the same subject.

The previous statutory enactments are, 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, s. 11; and 19 & 20 Vict. c. 108, s. 30; and in one of these, viz. 13 & 14 Vict. c. 61, s. 11, actions of detinue are specially mentioned amongst those in which more than 20*l.* must be recovered in order to entitle the plaintiff to costs. We regard this as a clear declaration of the intention of the legislature on this particular subject; and, although in the later Acts general words describing actions are used instead of a specific enumeration, we see no indication on the part of the legislature of any intention to alter the rule thus unambiguously laid down in the statute 13 & 14 Vict. c. 61.

If we look further into the history of actions of detinue, we find them based on the theory of a bailment, real or fictitious, imposing upon the defendant an obligation to return the chattel bailed, when his right to retain it as bailee had ceased to exist. A contract, real or fictitious, was the foundation of this obligation; and, although his breach of it was a wrong, it was so only in the sense in which every breach of every contract is a wrong. In theory, the action was founded on contract, and not on wrong independently of contract. This is, we think, proved by the passages referred to by Mr. Matthews in Bro. Abr. tit. *Detinue*, and by F. N. B. p. 138, *Detinue*; by the fact that counts in debt and detinue could be joined in one action (1 Ch. Pl. 109); by the fact that the defendant could wage his law in this form of action, on the ground that he had been previously trusted by the plaintiff (Bac. Abr. *Detinue*); and by the fact that detinue was one of those actions in which damages could be assessed by the sheriff under

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3 & 4 Wm. 4, c. 42, s. 17, when the plaintiff had obtained judgment by default: see *Walker* v. *Needham* (1), where counsel urged in vain that detinue was an action founded on tort, the gist of the action being the wrongful detainer. In this case, Tindal, C.J., said: "Detinue falls within that class of actions called actions of contract; and the whole course of the proceeding shews that it is a matter rather of contract than of tort."

It is very true that Mr. Tidd (whose authority on these matters was in our opinion too lightly esteemed by Mr. Matthews) classes detinue amongst actions of tort: see 1 Tidd's Pr. 9th ed. pp. 5, 11: and that Bayley, B., in *Gledstane* v. *Hewitt* (2), said: "The action of detinue is an action of wrong:" and it is quite true that the cause of action is the wrongful detention. In *Danby* v. *Lamb* (3), where this view was urged upon the Court, it was held that detinue was not an action for an alleged wrong within the terms of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). This decision was urged as fatal to the contention that, since the passing of the Common Law Procedure Act, 1852, detinue must, by reason of Schedule B. to that Act, be regarded as an action founded on tort, and not as an action founded on contract.

Having regard, then, to the history of the action, and especially to the terms of the statute of 13 & 14 Vict. c. 61, s. 11, we are of opinion that detinue ought to be regarded as an action founded on contract, and not as an action founded on wrong, within the true meaning of the statute 30 & 31 Vict. c. 142, s. 5, which we have to construe.

In this case it so happens that there was a real bailment of the picture by the plaintiffs to the defendant; and, although there was no express promise by him to return it when the purpose of the bailment was accomplished, his obligation then to restore it was a legal consequence of the terms on which he acquired it from the plaintiffs, and did not depend on the mere fact that they were the owners of the picture. In this particular case, therefore, the plaintiffs' cause of action was quite as much a breach of contract as a wrong independent of contract.

In construing the section of the statute on which this case

(1) 3 M. & G. 557.
(2) 1 C. & J. 570.
(3) 11 C. B. (N.S.) 423; 31 L. J. (C.P.) 17.

turns, we have referred to the following decisions:—*Legge* v. *Tucker* (1), *Tattan* v. *Great Western Ry. Co.* (2), *Baylis* v. *Lintott* (3), and *Pontifex* v. *Midland Ry. Co.* (4) All these cases were decided on the sections of the County Court Acts which are material for consideration; and they all, with the exception of *Tattan* v. *Great Western Ry. Co.* (2), support the view we take. That case, which turned on 9 & 10 Vict. c. 95, s. 129, is not, we think, opposed to our present decision; for, the decision there was that the plaintiff had chosen to base his claim upon tort, and not upon contract, as he might have done. In this case the plaintiffs not only framed their claim as a claim in detinue, claiming a return of the picture itself, but they actually recovered nominal damages for the detention of the picture, which they could not have done if they had sued simply for damages in an action founded purely on wrong.

Whilst, therefore, we agree with the plaintiffs that, as an abstract question, an action for the wrongful detainer of goods may often be an action founded on wrong, this action is not so founded within the true meaning of the statute which we have to interpret.

The decision of the master was therefore, we think, correct; and this application must be refused, with costs.

Rule refused.

Solicitor for plaintiffs: *E. W. Parkes.*

Solicitors for defendant: *Field, Roscoe, Field, Osbaldeston, & Co.*

(1) 1 H. & N. 500; 26 L. J. (Ex.) 71.
(2) 2 E. & E. 844; 29 L. J. (Q.B.) 184.
(3) Law Rep. 8 C. P. 345.
(4) 3 Q. B. D. 23.

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Feb. 25.

THE NEW BRITISH MUTUAL INVESTMENT COMPANY, LIMITED, *v.* PEED.

Practice—Discovery—Action for recovery of Land—Affidavit of Documents—Defendant's Title—Judicature Act, 1875, *Order XXXI., rr.* 12, 13.

The defendant in an action for the recovery of land of which he is in possession may be compelled by order under Order XXXI., Rule 12, to make an affidavit of his documents of title, although he may have a right to object to produce them.

MOTION to rescind an Order made at Chambers by Field, J., against the defendant for discovery of documents in an action for the recovery of land and mesne profits.

Lumley Smith in support of the motion. The defendant is in possession and cannot be compelled to disclose his title. It is said, however, that the defendant must make an affidavit of documents, and may thereupon object to produce them: Order XXXI., Rule 13. But to merely schedule the deeds with a sufficient description might enable a conveyancer to find that some link was missing in the defendant's title.

[LINDLEY, J. The rule that the defendant in ejectment cannot be made to disclose his title was never carried in equity to the extent of allowing him to refuse to make an affidavit of documents.]

Some special reason should at least be shewn to justify the common order for discovery in cases of ejectment.

Graham for the plaintiffs was not heard.

DENMAN, J. We think the order was rightly made. The mere fact that this action is practically one of ejectment does not exempt the defendant from the obligation to make an affidavit of discovery under the Judicature Act. He can, however, object to produce the deeds.

LINDLEY, J. I see no difference between ejectment and other actions in this respect.

Motion dismissed.

Solicitors for plaintiffs: *Lewis & Sons.*
Solicitor for defendant: *Mark Shephard.*

HANCOCKS & CO. *v.* MADAME DEMERIC-LABLACHE.

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March 9.

*Husband and Wife—Action to charge Separate Estate of Wife—Joinder of Husband as Defendant—*33 & 34 *Vict. c.* 93, *ss.* 1, 11—*Married Women's Property Act*, 1870—*Judicature Act*, 1873, *s.* 24, *sub-s.* 1, 7—*Order XVI., Rule* 13.

The husband of a married woman must be joined with her as a defendant in an action to charge wages and earnings which are her separate property under 33 & 34 Vict. c. 93 (The Married Women's Property Act, 1870).

CLAIM alleged that the plaintiffs were jewellers, and that the defendant was an actress and public singer, and as such was engaged in an employment from which she derived wages and earnings separately from her husband, whereby she had acquired separate property within the meaning of the Married Women's Property Act, 1870, and that the property so acquired had been received by the defendant on her sole receipt, and the property and investments thereof were held by the defendant in her own name as her separate property, and were under her sole power and control; that the plaintiffs sold her jewellery, for which she agreed to pay 28*l.* out of her separate property by instalments; that she duly paid two instalments out of her separate property, but had not paid the balance; that the defendant was living apart from her husband, and that the plaintiffs had been unable to discover his address; that the husband had no interest in the property sought to be charged, but the same remained in the hands of the defendant, with the acquiescence of her husband, in order to be applied as her separate property.

The plaintiffs claimed

1. A declaration that the separate property of the defendant vested in her or in any other person in trust for her was chargeable with the payment of the sum of 14*l.* and interest, and of the costs of the action.

2. Payment of the 14*l.* interest and costs accordingly, or, if the defendant should not admit possession of separate estate sufficient to answer the same, an inquiry of what the defendant's separate property consisted, and in whom it was vested, with proper conse-

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quential directions for payment thereout of the said sum, interest, and costs.

Demurrer on the ground that the defendant, being a married woman, could not be sued alone.

L. E. Pyke, for the defendant, was stopped, and the Court called on

William Baker, for the plaintiff. The action lies against the defendant alone. She could bind her separate estate, and did so effectually: *Murray* v. *Barlee.* (1) No personal remedy is claimed, but only a charge on her separate property, such as in *Picard* v. *Hine.* (2) It is not necessary to make any trustees for the wife parties to the action: *Davies* v. *Jenkins* (3); nor to join the husband in a suit in equity.

[LINDLEY, J. I never heard of the husband not being joined in a suit against his wife and her trustees.]

In *Gaston* v. *Frankum* (4) a bill was filed against a married woman and the trustee of her separate property, to enforce performance of a contract by her to take a lease; but the report does not shew that the husband was a party to the suit.

[LINDLEY, J. Counsel appeared for him.]

No one but the defendant, a married woman, was party to the suit of *McHenry* v. *Davies.* (5) Sect. 1 of 33 & 34 Vict. c. 93, enacting that the separate earnings of a married woman "shall be deemed and taken to be property held and settled to her separate use, independent of any husband," must be read with s. 11, which declares that "A married woman may maintain an action in her own name" for her separate property . . . . and shall have in her own name the same remedies as if such property belonged to her as an unmarried woman. She is thereby made a feme sole with respect to her separate estate, and can sue or be sued as such, for it is impossible to suppose that the legislature meant to allow her to sue as if unmarried, and yet, when sued, to set up her coverture. "I think," said Lord Eldon in *Beard* v. *Webb* (6), "it will be difficult to contend that the right to sue and the liability to be sued do not stand upon the same footing." The ratio decidendi of the

(1) 3 My. & K. 209.
(2) Law Rep. 5 Ch. 274.
(3) 6 Ch. D. 728.
(4) 2 De G. & Sm. 561.
(5) Law Rep. 10 Eq. 88.
(6) 2 B. & P. 93, at p. 99.

common law cases establishing that a wife cannot be sued alone does not apply where a charge only is claimed. No doubt a personal decree cannot be made: Bacon's Abrid. (7th ed.) title Baron and Feme (M), note, p. 738. The joinder of the husband was for conformity only: *Bell* v. *Commissary Hyde and Ux.* (1), but is no longer necessary. No action shall be defeated by reason of misjoinder of parties, Order XVI., Rule 13. With that rule must be read s. 24, sub-s. 1 and 7, of the Judicature Act, 1873, enabling the Court to deal with equitable claims. Must the device of creating a trustee by vesting a small sum in his name on trust for the married woman, and then joining him as a defendant, be resorted to that a technicality may be overcome? If forms are to prevail, the plaintiffs will contend that a married woman cannot plead by attorney, as she has done in this case, but must do so personally.

[He cited also *Manby* v. *Scott* (2); Com. Dig. tit. Baron and Feme; *Marshall* v. *Rutton* (3); *Vansittart* v. *Vansittart.* (4)]

L. E. Pyke, for the defendant.

[LINDLEY, J., intimated that the argument might be confined to the Married Women's Property Act, 1870].

The Act is express. Sects. 12, 13, and 14 specify in what cases a married woman shall be liable to be sued, viz., for her debts before marriage, for the maintenance of a pauper husband, or of her children; expressio unius est exclusio alterius, and there is no provision rendering her liable as a feme sole to an action such as this. Order XVI., Rule 8, allows married women, by leave of the Court, to sue or defend without their husbands and a next friend, on giving security for costs. But it is obvious that if she could be sued alone the husband would never be joined in actions to charge her separate estate. By Order IX., Rule 3, when husband and wife are both defendants, service on the husband shall be deemed good service on the wife, but the Court may order that the wife shall be served with or without service on the husband. This provision, however, relates to service only. In *Davies* v. *Jenkins* (5) the husband was joined. From a note to Order XVI., Rule 8, in

(1) Prec. Ch. 328.
(2) 2 Sm. L. C. (7th ed.) 429.
(3) 8 T. R. 545.
(4) 27 L. J. (Ch.) 222.
(5) 6 Ch. D. 728.

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Charley's Judicature Acts, 3rd ed. p. 457, it appears that "In the case of *Oakes* v. *Bedford* the Queen's Bench Division allowed a demurrer to a statement of claim in an action by a dressmaker against a married lady who was living apart and received an allowance from her husband. 'There would be extreme injustice,' the Court said, 'in making a charge upon the allowance in the absence of the husband.'" In *Atwood* v. *Chichester* (1), where judgment by default had been obtained against a married woman, and she appealed from a refusal of the Queen's Bench Division to set it aside, Cotton, L.J., expressly said that the husband ought to have been joined. The demurrer should be allowed, and leave to amend the action by adding the husband as a defendant may be given, as in *Duckett* v. *Gover*. (2)

LINDLEY, J. The question raised, though small, is extremely important, and by no means free from difficulty. This action is brought against a married woman whose earnings and wages, being the proceeds of an employment in which she is engaged apart from her husband, become her separate property within the terms of the Married Women's Property Act, 1870, and the plaintiffs rightly claim no relief against her personally, but only a charge on her property. The objection is that her husband is not made a party to the action. The claim alleges that the wife is living apart from him, that the plaintiffs have been unable to discover his address, and that he has no interest in the property. The point is whether this action can be decided in its present form without the husband; and I am unable to say that it can. If the contrary can be held, it must be decided by a higher tribunal. Before the Married Women's Property Act, 1870, it was well settled in Chancery as an inflexible rule, to which there were only special exceptions, such as in a case where a husband might be beyond the jurisdiction, that a suit could not be instituted by or against a married woman without the husband being a party. If she was suing by herself, or next friend, the husband was made plaintiff, and where she was sued he was made defendant: see the cases cited in Daniell's Chancery Practice, p. 162.

(1) Weekly Notes (Jan. 19, 1878), p. 3; 26 W. R. 320, at p. 322.
(2) 6 Ch. D. 82.

If this action had been a suit brought before the year 1870, no doubt the objection to the form of it could have been taken successfully. Now, the first question here is whether, on the true construction of the Married Women's Property Act, 1870, such property as is therein declared to belong to her for her separate use is property in respect of which she can sue and be sued as if unmarried? That it is such as she can sue for, is undoubtedly declared in s. 11, but save in certain excepted cases, the Act does not expressly render her liable to be sued, and ss. 1 and 11 cannot be construed to mean that the property in s. 1, declared to belong to her apart from her husband, will, by virtue of s. 11, belong to her in all respects as if she were an unmarried woman. I do not think it mere accident that a different set of phrases was used in s. 1 and s. 11. It may have been thought expedient to give the wife power to sue in actions without joining her husband, and yet not to give power to others to sue her without joining him, and I cannot hold that the words in s. 1 are equivalent to a provision that the property therein mentioned shall be deemed to belong to the wife as if she were unmarried. Starting from that point, I come to the conclusion that the property specified in s. 1 must be treated as belonging to the wife in the manner and to the extent there mentioned, viz., as if settled to her separate use. Whether there has been an intentional or unintentional omission to render the wife liable to suit alone, I cannot supply it. Of that I have no doubt.

So I find that the Act has not altered the law as to the proper mode of suing a married woman in respect of that property which by this Act is made her separate estate.

Is there anything in the Judicature Act affecting this question? I think there is nothing which alters the whole law on this point, but it is declared that where there is no provision on the subject in the Act, the old practice shall be followed. Therefore, as I find in neither the Married Women's Property Act nor the Judicature Act any authority for departing from the old established practice, I must allow the demurrer.

The question is one of much more than mere form, because if the action could be maintained without joining the husband, judgment binding the wife's estate might be obtained against it in his

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absence, whereas he might have been able to successfully resist it, and so protect his own interests.

Demurrer allowed, with liberty to the plaintiffs to amend, and to serve interrogatories on the defendant inquiring the name and address of her husband.

Solicitor for plaintiffs: *Pilcher.*
Solicitors for defendant: *Lumley & Lumley.*

March 20.

[IN THE COURT OF APPEAL.]

GRANT *v.* THE BANQUE FRANCO-EGYPTIENNE.

Practice—Appeal—Staying Payment of Costs.

The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund in case of the order being reversed.

Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to the applicant.

THIS was an application by the Banque Franco-Egyptienne for an order staying the payment of taxed costs pending the argument of the demurrers, and pending an appeal to the House of Lords.

The action was commenced in January, 1875, for a prohibition to restrain the Banque and the mayor and commonalty of the city of London from proceeding with a plaint and garnishment against the plaintiff in prohibition, by which the Banque sought to attach moneys alleged to be due from the plaintiff in prohibition to the Atlantic and Great Western Railroad. The defendants in prohibition pleaded to the declaration. The plaintiff in prohibition demurred to all the pleas. On the 17th of January, 1876, the demurrers were argued and judgment directed to be entered for the plaintiff. The defendants gave notice of appeal from this decision.

In November, 1876, the issues of fact were tried and a verdict given for the defendants in prohibition, the jury finding that the

cause of action arose within the city of London. Motion was made to enter judgment for the plaintiff in prohibition, or for a new trial, and on the 8th of May, 1877, a divisional Court of the Common Pleas Division declined to enter a verdict for the plaintiff, but directed a new trial.

The Banque appealed from this order, and the plaintiff gave notice that on the hearing of the appeal he should apply for judgment on all the issues, on the ground that there was no evidence to go to the jury that the cause of action arose in the city of London. On the 21st of November, 1877, the Court of Appeal at Westminster dismissed the appeal of the Banque, and ordered judgment to be entered for the plaintiff in prohibition that a writ of prohibition do issue. It was also ordered that the Banque should pay the plaintiff the general costs of the prohibition proceedings and of the appeal, such costs not to include the costs of the demurrers, as to which the Court made no order, there being an appeal pending.

The costs directed to be paid by the Banque under the last-mentioned order were taxed, and on the 15th of March, 1878, the amount was fixed at 137*l.*

March 20. The Banque applied as above. The affidavit in support of the application stated that they were advised to appeal to the House of Lords, and that in order to bring the whole matter before the House of Lords it was necessary that the Court of Appeal should give judgment upon the demurrers, and that the costs of the demurrers were very heavy, and would probably be nearly equal to the costs which had been taxed.

Sir H. Giffard, S.G., and *Warmington*, for the defendants. [*Cooper* v. *Cooper* (1) and *Morgan* v. *Elford* (2) were referred to.]

Murphy, Q.C., and *Lumley Smith*, contrà.

JESSEL, M.R. This application to stay the payment of costs is based upon two grounds, which appear to me to be perfectly distinct, and which ought to be dealt with separately. The first ground is that the costs ordered to be paid by the Court of Appeal are ordered to be paid under a decision which will be the subject

(1) 2 Ch. D. 492. (2) 4 Ch. D. 388.

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of an appeal to the House of Lords. That is in itself not a sufficient ground, because there ought to be in strictness a pending appeal; but where it is quite certain that there will be an appeal, and where, as in this case, the parties give an undertaking to present a petition of appeal within a fortnight, and if they do not present it the order will fall to the ground, we do no injustice in making the same order as if the appeal had been actually presented. Now, if the appeal had been actually presented, the course of the Court is settled by two decisions, the last being that of *Morgan* v. *Elford* (1), and that is to order the costs to be paid, the solicitors who receive the costs personally undertaking to repay in case the decision is reversed, an undertaking which the solicitors in this case are willing to give; and that being so as to that part of the application, the only order that will be made will be, that if the undertaking of the applicants is complied with by the presentation of a petition of appeal to the House of Lords within fourteen days from to-day, then the solicitors for the plaintiff will undertake to repay the costs in case of the decision being reversed.

The other part of the application is of a totally different character. It appears that in the course of the action a demurrer was put in—that demurrer is still pending for argument before the Court of Appeal. The Court of Appeal has already decided the substance of the action, that is, it has decided that there was no evidence to go to the jury, and therefore that the plaintiff in prohibition ought to succeed. However the demurrer may be decided, the ultimate decision cannot be affected by it, and therefore the mere question to be decided on the demurrer, assuming the House of Lords affirms the decision of the Court of Appeal that there was no cause of action arising within the city, will be merely a question of costs; and the suggestion made on the part of the applicants is that, inasmuch as the question upon the demurrer may be ultimately decided in their favour, in that case the applicants would be entitled to costs which, supposing they had not paid the costs to the other side ordered to be paid by the Court of Appeal, might be set off against those costs; in other words, assuming that a decision should be afterwards made in their favour upon an

(1) 4 Ch. D. 388.

interlocutory application with costs, then they would be deprived of the right of set-off to those costs by reason of the previous decision. It appears to me that is no answer at all. It is quite true that the question could not have arisen formerly in a Common Law Court, because there was no judgment and no taxation till the final judgment; but that is not so now; the course of practice in all the Courts in this respect is the same; you may have separate orders and separate taxations, if the Court so directs, and, as I understand, the effect of the judgment of the Court of Appeal is to direct a taxation of the costs which that Court has ordered to be paid. It was quite unheard of, in courts where the practice of several taxations prevailed, that the mere chance of the litigant obtaining costs upon a decision at some subsequent stage of the case was to prevent his paying the costs already ordered to be paid under a separate judgment. Certainly no such rule ever existed in the old Court of Chancery, and no such practice has been established under the Judicature Act; it does not appear to me that we ought to establish any such practice, and that part of the application ought to fail. According to the present practice, the applicants must pay the costs of the application.

COTTON, L.J. I agree.

THESIGER, L.J. I am of the same opinion.

Order accordingly.

Solicitors for plaintiff: *G. S. & H. Brandons.*
Solicitor for defendants: *A. G. Ditton.*

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Feb. 27.

[IN THE COURT OF APPEAL.]

USIL *v.* BREARLEY.
THE SAME *v.* HALES.
THE SAME *v.* CLARKE.

Practice—Security for Costs in Appeal—Rules of the Supreme Court, Order LVIII., Rule 15.

An appellant will be ordered to give security for the costs of the appeal who is in insolvent circumstances, and also is vexatiously and unreasonably prosecuting the appeal.

Quære, whether insolvency in an appellant is a special circumstance within the meaning of Order LVIII., r. 15, which will entitle the respondent to an order for security for costs.

MOTION calling upon the plaintiff to shew cause, why he should not be ordered to give security for costs, on an appeal by him from a judgment of the Common Pleas Division in favour of the defendants.

Actions of libel against the defendants respectively, as the publishers of three distinct and separate newspapers.

It appeared that certain persons who had been employed by the plaintiff, a civil engineer, upon certain works connected with a foreign railway, applied to one of the metropolitan magistrates in open court for a summons against the plaintiff under the Masters and Servants Act (30 & 31 Vict. c. 141), to compel the payment of certain wages alleged to be due to them. The magistrate refused the application, on the ground that he had no jurisdiction to entertain it. The defendants published in their respective newspapers a report of the proceedings before the magistrate. At the trial the jury found that the statements were a fair report of what had occurred, and the learned judge directed judgments to be entered for the defendants respectively.

A motion for a new trial in the Common Pleas Division, on the ground that an action would lie for the publication of a report of a judicial proceeding containing defamatory matter, where the court had no jurisdiction to entertain the proceedings, having been refused, the plaintiff appealed.

It was admitted that the plaintiff was in insolvent circumstances.

Yelverton, for the defendant Brearley. By Order LVIII., Rule 15 (1), the Court of Appeal may direct security to be given for the costs that may be occasioned by an appeal if there are special circumstances. Here it is admitted that the plaintiff is in insolvent circumstances and unable to pay the costs of the appeal. Insolvency in an appellant brings the case within the order so as to entitle the defendant to security: *Wilson* v. *Smith* (2).

Shortt, for the plaintiff. If the contention on behalf of the defendant were to prevail, and the poverty of an appellant were held to be special circumstances under the order, the effect would be that the plaintiff would be deprived of his right to appeal because he was a poor man.

Bremner, for the defendant Hales, and *Arthur Child* for the defendant Clarke, were not heard.

COCKBURN, C.J. We think that this application should be acceded to, and that the plaintiff should find security for a moderate amount of costs. I think that in considering the question we are justified in taking into account not merely the pecuniary position of the plaintiff, but also the other circumstances of the case. If the Court were of opinion that the plaintiff had any reasonable ground for going on with his action, they should not allow mere poverty to stand in the way of his appeal. But we are justified in looking at the peculiar circumstances of the case; and to my mind the law is clear, and the principles on which it rests are well settled. Though there is no immediate decision on the point, yet if we go upon the rules previously settled, it seems perfectly clear that we cannot, because the matter was ex parte, and the magistrate had no jurisdiction, take away the privilege of publishing fair reports of proceedings in local courts of justice. The public have access to them, so that everyone can hear what takes place in them, and the publication of reports in newspapers only enlarges the area of publicity given to matters which justice requires should be done in open court, and to which it is to the public advantage that publicity should be given.

We may fairly take into consideration the character of the

(1) By Order LVIII., r. 15, . . . such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

(2) 2 Ch. D. 67.

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action and the questions involved: and we cannot help noticing that it was a vexatious proceeding on the part of the plaintiff to bring three actions, all for the same cause of complaint, at the same time, when one would have been sufficient for his purpose. A moderate sum brought into court or reasonably secured by the plaintiff will satisfy the requirements of the case. A sum of 50*l.* should be paid into court, or security given to that amount in each action, and on such payment being made, or security given, the plaintiff may be allowed to proceed.

BRAMWELL, BRETT, and COTTON, L.JJ., concurred.

Application granted.

Solicitors for plaintiff: *Carr, Fulton, & Carr.*
Solicitor for Brearley: *James Goven.*
Solicitors for Hales: *Ashurst, Morris, & Co.*
Solicitors for Clarke: *H. J. & T. Child.*

April 6.

HUNT *v.* THE WIMBLEDON LOCAL BOARD.

Contracts by Corporations—Distinction between trading Corporations and Local Boards or Corporations created for public Purposes—Public Health Act, 1848 (11 *&* 12 *Vict. c.* 63), *s.* 85—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 173, 174.

Sect. 85 of the Public Health Act, 1848, and s. 174 of the Public Health Act 1875, enact (without any words of prohibition) that "every contract made by a local board, or by an urban authority, whereof the value or amount exceeds [10*l.*] 50*l.*, shall be in writing, and sealed with the common seal of such authority."

The defendants, a "local board" and an "urban authority" under the above-mentioned Acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to and approved and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans; nor was there any resolution of the board authorizing their preparation:—

Held, that, by reason of the non-compliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act, that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them.

ACTION for work and labour done and money paid by the plaintiff at the request of the defendants.

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At the trial before Lindley, J., at Westminster, on the 13th and 14th of March, 1878, it was proved that the surveyor of the defendants, acting under verbal instructions from them, in May, 1875, employed the plaintiff, an architect, to prepare plans and drawings for offices which they had determined to erect. The plans were submitted to and approved by the defendants, and quantities were by their direction taken out, and advertisements were issued for tenders for the building. The proposed plan, however, was found to be too expensive, and, though tenders were received, none was accepted; and ultimately offices upon a less extensive scale were erected from plans furnished by another architect.

It was objected on the part of the board, that, inasmuch as they were by s. 85 of the Public Health Act, 1848 (1), and s. 174 of the Public Health Act, 1875 (2), only empowered to contract under seal, and this contract, which was for an amount exceeding the prescribed limit, not being under seal, the action could not be maintained. For the plaintiff it was insisted that the work in question, being one of necessity, did not fall within the description of contracts which were by the statutes required to be under seal.

In answer to questions put to them by the learned judge, the jury found that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was subsequently ratified by them; and further, that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed: and they assessed their value at 94*l*. Judgment was deferred.

March 22. *Patchett, Q.C.*, moved to enter judgment for the plaintiff upon the findings of the jury.

Marriott, Q.C., and *Paterson*, shewed cause. The question turns upon the true construction of s. 85 of the Public Health Act, 1848, which was in force at the time the order for the plans was given, and ss. 173, 174 of the Public Health Act, 1875 (3), which so far

(1) 11 & 12 Vict. c. 63.
(2) 38 & 39 Vict. c. 55.
(3) The 11 & 12 Vict. c. 63, s. 85, enacted "that the local board of health

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as regards this matter do not materially differ. There are, no doubt, authorities to shew that some of the requirements mentioned in these enactments are directory only, and may be dispensed with. There is a material distinction between corporations like that now

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may enter into all such contracts as may be necessary for carrying the Act into execution; and every such contract whereof the value or amount shall exceed 10*l.* shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, or (in the case of a corporate district) sealed with the common seal, and shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall fix and specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed; and every contract so entered into, and duly executed by the other parties thereto, shall be binding on the local board by whom the same is executed, and their successors, and upon all other parties thereto, and their executors, administrators, successors, and assigns, to all intents and purposes."

The 38 & 39 Vict. c. 55, s. 173, enacts that "any local authority may enter into any contract necessary for carrying this Act into execution."

And s. 174 enacts that, "with respect to contracts made by an urban authority under this Act, the following regulations shall be observed, viz.—

"(1.) Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority:

"(2.) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed:

"(3.) Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing and also maintaining the same in repair during a term of years or otherwise:

"(4.) Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same:

"(5.) Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors, and on all other parties thereto and their executors, administrators, successors, or assigns, to all intents and purposes," &c.

in question, intrusted with the performance of public duties and functions, and corporations created merely for trading purposes. In the case of corporations of the latter description, more laxity in the making of contracts is permitted than in the former: *Sanders* v. *St. Neot's Union* (1); *Frend* v. *Dennett* (2) in this Court, and also in Equity (3), where the rule of law is laid down by Wood, V.C. And see *South of Ireland Colliery Co.* v. *Waddle.* (4) Further, it was not competent to the local board to delegate their power of contracting to their surveyor or to any other person, so as to bind the rate-payers. Where it was intended by the legislature to give the board power to delegate any portion of its authority, they have so provided, as in ss. 200, 201 of the Public Health Act, 1875. And see *Cook* v. *Ward.* (5) The first finding of the jury, therefore, is immaterial. There are many cases in Equity, under the Winding-up Acts, where it has been decided that the directors even of a trading corporation can only act within the scope of their special Act or articles of incorporation. See *In re Leeds Banking Co., Howard's Case* (6); *Riche* v. *Ashbury Railway Carriage and Iron Co.* (7); *In re County Palatine Loan and Discount Co., Cartmell's Case.* (8)

[LINDLEY, J., referred to *Crampton* v. *Varna Ry. Co.* (9)]

The finding that the act of the surveyor was ratified by the board is equally immaterial; for, the board could not, even under seal, ratify a contract which they had no power to enter into.

Patchett, Q.C., and *E. Clarke*, contrà. The 173rd section of the Public Health Act, 1875, enacts generally that "any local authority may enter into *any contracts necessary for carrying the Act into execution.*" The jury have expressly found that this was a contract of that description. The contracts to be made "under this Act," which are to be made subject to the provisions and restrictions of s. 174, are, the general contracts as to paving, lighting, watering, and dusting the streets and houses of the district, and not contracts like the present, which is

(1) 8 Q. B. 810.
(2) 4 C. B. (N.S.) 576; 27 L. J. (C.P.) 314.
(3) 5 L. T. (N.S.) 73.
(4) Law Rep. 3 C. P. 463; on appeal, 4 C. P. 617.
(5) 2 C. P. D. 255.
(6) Law Rep. 1 Ch. 561.
(7) Law Rep. 9 Ex. 224; 7 H. L. C. 653.
(8) Law Rep. 9 Ch. 691.
(9) Law Rep. 7 Ch. 562.

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expressly authorized by s. 197. (1) Assuming that this was a contract under s. 174, if it were executory, no action would lie upon it, for want of the observance of the conditions imposed by the Act; but it is otherwise where the work has been done, and the board have had the benefit of it; *Clarke* v. *Cuckfield Union* (2); *Sanders* v. *St. Neot's Union* (3); *Nowell* v. *Mayor of Worcester* (4); *Reuter* v. *Electric Telegraph Co.* (5); *Nicholson* v. *Bradfield Union.* (6) In *Pearce* v. *Morrice* (7), Taunton, J., lays down the following rule for distinguishing between imperative and merely directory enactments,—"A clause is *directory* where the provisions contain mere matter of direction, and no more; but not so when they are followed by words of prohibition." Sect. 173 of the Act of 1875 contains no words of prohibition. The defendants here have had the benefit of the plaintiff's work; the contract was entered into by their surveyor by their direction; and the jury have found that his acts were ratified by them. Whether the ratification was under seal or by acts and conduct can make no difference.

Cur. adv. vult.

April 6. LINDLEY, J. This is an action brought to recover compensation for certain plans made by the plaintiff for offices contemplated by the defendants, but never in fact erected. The plans were made by the directions of the defendants' surveyor, and, when made, they were submitted to the defendants' board, and were so far approved and adopted that quantities were taken out and advertisements were issued for tenders for the erection of offices according to the plans. The tenders, however, proving too high, they were not accepted, and the offices designed by the plaintiff were not constructed. The plans, therefore, were of no further use to the defendants. Other offices have, however, been constructed for them from other plans.

The jury have found that the defendants' board authorized their

(1) Section 197: "Every urban authority shall from time to time provide and maintain such offices as may be necessary for transacting their business and that of their officers and servants under this Act."

(2) 21 L. J. (Q.B.) 349.
(3) 8 Q. B. 810.
(4) 9 Ex. 457; 23 L. J. (Ex.) 139.
(5) 6 E. & B. 341; 26 L. J. (Q.B.) 46
(6) Law Rep. 1 Q. B. 620.
(7) 2 Ad. & E. 96.

surveyor to employ the plaintiff to prepare the plans, and ratified the act of their surveyor in procuring them; and the jury have further found that some new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of the offices for which they were designed; and they assessed the damages to which the plaintiff is entitled (if he is entitled to any from these defendants) at 94*l.*

Under these circumstances, the plaintiff would clearly be entitled to judgment, were it not for the fact that the defendants are a corporation, and that their power of contracting is regulated by Act of Parliament. The Act which was in force when the plans were ordered was the Public Health Act, 1848 (11 & 12 Vict. c. 63). This Act was repealed and replaced by the Public Health Act, 1875 (38 & 39 Vict. c. 55), before the plans were finished. But the 85th section of the first Act, although broken into paragraphs, and differently printed, was substantially re-enacted by ss. 173, 174, of the second Act; and, having carefully compared the above sections, I can find no difference material to the present case between s. 85 of the Act of 1848 and ss. 173 and 174 of the Act of 1875, except that 50*l.* is substituted for 10*l.* as the limit for contracts which do not require any particular formalities.

It is admitted that the defendants were a local board within the meaning of s. 85 of the Act of 1848, and an urban authority within the meaning of s. 174 of the Act of 1875; and it is admitted that there was no contract under seal with the plaintiff, and no ratification under seal of any contract with him. Neither was there in fact any resolution expressly authorizing the preparation of the plans or expressly referring to or ratifying their preparation for the board.

The question I have to determine is, whether, under the above circumstances, and having regard to the above enactments, the defendants are liable to pay for the plans in question.

Now, in the first place, it is to be observed that the defendants are not a trading or commercial corporation having gain for its object: they are created for the purposes mentioned in the Public Health Acts, and they are in fact the representatives of and trustees for the inhabitants of Wimbledon for such purposes. I cannot therefore regard as applicable to this case those numerous

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decisions which shew that incorporated companies having gain for their object are liable in respect of contracts not under seal, provided they are necessary for and incidental to the purposes for which they are created. Such cases, for example, as *South of Ireland Colliery Co.* v. *Waddle* (1) and *Reuter* v. *Electric Telegraph Co.* (2) do not, in my opinion, govern this case.

Neither can I treat the defendants as a corporation to which no Act of Parliament is specially applicable. It is not necessary, in order to decide this case, to try to reconcile the conflicting decisions upon the general question whether a corporation not governed by any special Act of Parliament is liable on unsealed contracts of which it has had the benefit. Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed, under circumstances which render the equitable doctrines of part-performance applicable, the contract will, I apprehend, bind such a corporation: *Crook* v. *Seaford* (3): but, in other cases, it is extremely doubtful whether the mere fact that a contract, not otherwise binding on the corporation, has been wholly or partly performed renders the corporation liable to be sued either on the contract or on a quantum meruit. *Nicholson* v. *Bradfield Union* (4), *Clarke* v. *Cuckfield Union* (5), and *Haigh* v. *North Brierly Union* (6), are the leading authorities in favour of the corporation being liable; and *Waghorn's Case* (7), before Mr. Justice Manisty, may be added to them. On the other hand, *Mayor of Ludlow* v. *Charlton* (8), *Lamprell* v. *Billericay Union* (9), *Smart* v. *West Ham Union* (10), at law, and *Kirk* v. *Bromley Union* (11), and *Crampton* v. *Varna Ry. Co.* (12), in equity, are leading authorities to the contrary.

In this case, however, I have to construe and apply a special Act of Parliament; and, although some of the provisions of the

(1) Law Rep. 3 C. P. 463; on appeal, Law Rep. 4 C. P. 617.
(2) 6 E. & B. 341; 26 L. J. (Q. B.) 46.
(3) Law Rep. 10 Eq. 678, and 6 Ch. 551.
(4) Law Rep. 1 Q. B. 620.
(5) 21 L. J. (Q.B.) 349.
(6) E. B. & E. 873; 28 L. J. (Q.B.) 62.
(7) Not reported.
(8) 6 M. & W. 815.
(9) 3 Ex. 283.
(10) 10 Ex. 867; 24 L. J. (Ex.) 201; 11 Ex. 867; 25 L. J. (Ex.) 210.
(11) 2 Ph. 640.
(12) Law Rep. 7 Ch. 562.

above-mentioned sections are not in my opinion applicable to such a contract as I have here to deal with, the provision requiring a seal where the contract is for more than 10*l.* or 50*l.*, as the case may be, is I think applicable to it; and, having regard to the objects and terms of those sections, and to the case of *Frend* v. *Dennett* (1), I am unable to hold that the clause requiring a seal is a merely directory clause.

In *Nowell* v. *Mayor of Worcester* (2), other clauses requiring other things to be done by the board were held to be directory only, because the plaintiff could not ascertain whether they were done or not. This reason has no application to the clause requiring contracts to be sealed; and it appears to me that I should be depriving the rate-payers of the protection intended to be afforded them by the statutes with which I have to deal, if I held the defendants liable to pay for work done under a contract required by those Acts to be under seal, and not in that form.

The observations of Baron Rolfe in *Mayor of Ludlow* v. *Charlton* (3) are in my opinion very pertinent to cases of this description; and, thoroughly concurring, as I do, with those decisions which have relaxed the old rule as to the necessity for a seal to bind certain classes of corporations, I do not feel myself at liberty to depart from the plain words of the statutes by which this case is governed.

Notwithstanding, therefore, the answers given by the jury to the questions put to them, I give judgment for the defendants, with costs.

Judgment for the defendants.

Solicitor for plaintiff: *W. J. Foster.*
Solicitor for defendants: *W. H. Whitfield.*

(1) 4 C. B. (N.S.) 576; 27 L. J. (C.P) 314; and in Equity, 5 L. T. (N.S.) 73.

(2) 9 Ex. 457; 23 L. J. (Ex.) 139.

(3) 6 M. & W. 815.

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Feb. 8.

[IN THE COURT OF APPEAL.]

MORTIMORE *v.* CRAGG.

IN THE MATTER OF THE SHERIFF OF SURREY.

Sheriff—Fieri Facias—Poundage—Recovery of Judgment Debt without Sale— 28 *Eliz. c.* 4.

A sheriff, who by compulsion of a writ of fi. fa., recovers the amount of a judgment-debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized.

Roe v. *Hammond* (2 C. P. D. 300) overruled.

AN order had been obtained to shew cause why the sheriff of Surrey should not repay to the defendant the sum of 4*l.* 9*s.* for poundage, on the ground that there was no sale, and that the sheriff was not entitled to poundage.

It appeared from the affidavits that judgment in this action having been signed against the defendant, the plaintiff issued execution thereon and the sheriff seized the defendant's goods; after remaining in possession thereof for some days he gave them up to the defendant again without selling them, upon the defendant paying to the sheriff's officer the amount then due for debt and costs on the judgment and possession money, and in addition the sum of 4*l.* 9*d.* for poundage, which was claimed by the sheriff's officer.

The order in the Common Pleas Division was made absolute for the repayment by the sheriff to the defendant of the sum of 4*l.* 9*s.*, the Court (Cockburn, C.J., and Grove, J.) considering themselves bound by the authority of *Roe* v. *Hammond.* (1)

The sheriff appealed.

Feb. 7, 8. *Sir H. Giffard, S.G.* (*Grantham, Q.C.*, with him), for the sheriff. The decision in the Common Pleas Division was wrong. It is plain from the authorities cited in *Bissicks* v. *Bath Colliery Co.* (2) that where the judgment-debt is paid to the sheriff by compulsion of the writ of fieri facias he is entitled to poundage. The only decision to the contrary is *Roe* v. *Hammond* (1), and that case is clearly inconsistent with the course of previous authorities.

(1) 2 C. P. D. 300. (2) 2 Ex. D. 459.

Talfourd Salter, Q.C., and *Lumley Smith*, for the defendant. This Court cannot decide in favour of the sheriff without overruling *Roe* v. *Hammond* (1), and the decision in that case was founded upon the statement given in Lofft, p. 433, as to the practice then prevailing in the Court of King's Bench. The sheriff must make out a statutory right to poundage, for at common law he was bound to execute the king's writ without receiving any remuneration: *Graham* v. *Grill* (2); and none of the statutes conferring the right to poundage empower the sheriff to levy it where there has been no sale: 28 Eliz. c. 4; 3 Geo. 1, c. 15; 43 Geo. 3, c. 46; 1 Vict. c. 55; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 123; Rules of the Supreme Court, Order XLII., Rule 13. The language of Lord Ellenborough, in *Bilke* v. *Havelock* (3), is a very strong authority to shew that unless there be a sale the sheriff is not entitled to poundage. *Rex* v. *Robinson* (4) explains the decision in *Alchin* v. *Wells* (5), which at first sight might seem to shew that the sheriff is entitled to poundage although there has been no sale; the real bearing of these cases is pointed out by Lord Coleridge, C.J., in *Roe* v. *Hammond*. (6) The reasoning of Jervis, C.J., in *Masters* v. *Lowther* (7), shews that an actual sale is necessary to confer the right to poundage. Upon a similar principle the sheriff is not entitled to poundage, where after seizure and before sale the judgment and all subsequent proceedings are set aside for irregularity: *Miles* v. *Harris*. (8) The question now in dispute did not arise in *Sneary* v. *Abdy* (9), for in that case the sheriff claimed only possession money, fees, and incidental expenses; but in *Roe* v. *Hammond* (10) it was stated by Grove, J., that in *Sneary* v. *Abdy* (9) all the judges were of opinion that the right to poundage depended upon an actual levy of the debt. The word "levy" implies more than seizure; it means seizure and sale.

Grantham, Q.C., in reply. Money is "levied" by the sheriff, if

(1) 2 C. P. D. 300.
(2) 2 M. & S. 294; per Lord Ellenborough, C.J., at p. 297.
(3) 3 Camp. 374.
(4) 2 C. M. & R. 334.
(5) 5 T. R. 470.
(6) 2 C. P. D. 300, at pp. 305, 306.
(7) 11 C. B. 948, at p. 953; 21 L. J. (C.P.) 130, at p. 132.
(8) 12 C. B. (N.S.) 550; 31 L. J. (C.P.) 361.
(9) 1 Ex. D. 299.
(10) 2 C. P. D. 300, at p. 307.

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it is actually received by him; in Tomlin's Law Dictionary "levy" is said to mean "to collect or exact;" and according to this interpretation if the amount is actually obtained by virtue of the writ, it is "levied," and it becomes immaterial to consider whether there is or is not a sale. In the present case the seizure by the sheriff compelled the defendant to pay the amount of the judgment-debt, and therefore nothing is wanting to enable him to enforce the right to poundage: *Rex* v. *Jetherell.* (1) If any portion of the judgment-debt is paid after a valid seizure, nothing afterwards done by the parties to the action can take away the right to poundage: *Alchin* v. *Wells* (2); *Chapman* v *Bowlby.* (3)

BRAMWELL, L.J. I am of opinion that the judgment should be reversed. It seems to me, that if we look at the statute and the authorities, the sheriff is entitled to poundage. The statute 28 Eliz. c. 3, says that the sheriff shall not take more than 12*d.* for every 20*s.* "for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person or persons whatsoever . . . *that he or they shall so levy* or extend and deliver in execution." I am of opinion that "deliver in execution" must be coupled with "extent;" it cannot apply to body or goods, and therefore "deliver in execution" should be limited to process in respect of lands. The sheriff holds an inquisition and delivers the land in execution, but he does not deliver goods under a fi. fa. I think Watson's, B., opinion, as expressed in *Carter* v. *Hughes* (4), confirms this view. I do not think those words have any connection with a writ of fi. fa., because the sheriff does not deliver the goods in execution; he delivers the money because he has made it from a sale of them. It then becomes a debt due from him, and an action for money had and received would lie against him. He is to recover it; the words are "*shall so levy;*" and notwithstanding that it is his duty and he is bound to recover it, he cannot sell the goods after a tender: *Taylor* v. *Bekon* (5); *Brun* v. *Hutchinson* (6). Why is a payment to the sheriff upon a fieri facias a good plea? It must be because he has authority to levy the debt by receiving money. I do not wish to

(1) Parker, 177.
(2) 5 T. R. 470.
(3) 8 M. & W. 249.
(4) 2 H. & N. 714, at p. 723.
(5) 2 Lev. 203.
(6) 2 D. & L. 43.

question the decision of *Nash* v. *Dickenson* (1). That was a perfectly correct decision, because there was no seizure in that case. The sheriff there did not "*levy*." The test is, supposing the sheriff had not the authority of the Court, could an action of trespass be brought against him? I think the words in the statute of Elizabeth, "shall so levy," mean "shall seize, and thereby get the money." In addition to the construction of the statute, there is a current of authorities which all run one way. The decisions in some of these cases go further than is necessary to support the present case. It is the seizure made by the sheriff that produces the money; therefore, where there is a compromise after the seizure but before any sale, the sheriff is entitled to his poundage. I cannot find a trace of a real authority against the claim of the sheriff for his poundage, and I think that he is entitled to our judgment. I ought to mention that in the case of judgment and execution being set aside through no fault of the sheriff, he would be entitled to his poundage if he has actually received the amount of the judgment debt.

BRETT, L.J. I am of the same opinion. Where an execution issues the transaction may be divided into four parts: 1. The delivery of the writ to the sheriff: 2. Seizure: 3. The possible payment of money after seizure: 4. If no payment, sale. The first step does not entitle the sheriff to poundage; and if he does not seize, *Nash* v. *Dickenson* (1) is an authority that he is not entitled to poundage. Although he seizes, nothing may be realised, because the seizure may be wrongful; it may be withdrawn by direction of law, then the sheriff would receive no poundage. Then comes the case after seizure. The money may be paid by the execution debtor either directly or indirectly: directly by virtue of the seizure to the sheriff; indirectly where payment is made by means of a compromise which is the consequence of the seizure; in either of those cases the sheriff is entitled to poundage. If a sale takes place, again the sheriff is entitled to poundage. As to the construction of 28 Eliz. c. 4, I agree with Lord Justice Bramwell. The proper construction is "goods levied," and "lands extended," and "delivered in execution." The words "delivered in execution" do not apply to an execution under a writ of fi. fa. The

(1) Law Rep. 2 C. P. 252.

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word "levy" in legal meaning is where goods are seized and money obtained by compulsion. If that is the meaning of levy, it does not necessarily comprise sale. *Alchin* v. *Wells* (1) is in point. The Court there say: "The sheriff who has levied is entitled to his poundage." It seems to me that *Rex* v. *Robinson* (2) is to the same effect. Where the money has been obtained by the seizure, although there has been no sale, the sheriff has a right to his poundage. In *Chapman* v. *Bowlby* (3) both Lord Abinger, C.B., and Parke, B., recognise the principle laid down in *Alchin* v. *Wells* (1), and hold that where, by the compulsion of the writ, the execution debtor has been forced to pay the debt, the sheriff is entitled to his poundage. The last case decided on the point was *Bissicks* v. *Bath Colliery Co.* (4), before Cockburn, C.J., and Cleasby, B., who acted upon the rule laid down in the previous cases. There is not one decision to the contrary except *Roe* v. *Hammond* (5) and the case under consideration. To entitle the sheriff to his poundage a sale is not necessary; it is enough if there is a seizure and the money is obtained either directly or indirectly. General principles, the construction of the statute, and the authorities, all support the conclusion that the sheriff in the present case is entitled to the poundage which he claims.

COTTON, L.J. The first question is whether the words of the statute of Elizabeth, "delivered in execution," apply to the execution of a writ of fi. fa. I agree with Lord Justice Bramwell that they do not. When can the sheriff be said to levy? It is true there must be a seizure, but when he has seized it is not necessary, to enable him to recover poundage, that he should sell; it is sufficient if by reason of the seizure the money is obtained directly or indirectly; if it is obtained, then there has been a levy. All the authorities go to this conclusion. Whenever process is made effectual by payment of money, the sheriff is entitled to his poundage.

Judgment reversed.

Solicitors for the Sheriff: *Abbott & Co.*
Solicitor for defendant: *S. Chester.*

(1) 5 T. R. 470.
(2) 2 C. M. & R. 334.
(3) 8 M. & W. 249.
(4) 2 Ex. D. 459.
(5) 2 C. P. D. 300.

[IN THE COURT OF APPEAL.]

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Jan. 14.

BERGHEIM *v.* THE GREAT EASTERN RAILWAY COMPANY.

Railway Company—Common Carriers—Passenger's Luggage placed in Compartment with him—Negligence.

A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part.

ACTION against the defendants, as carriers, for loss of a dressing-bag.

At the trial before Manisty, J., during the Trinity Sittings, 1877, the following facts were proved: the plaintiff and his wife came to a station of the defendants for the purpose of being carried as passengers with their luggage to Yarmouth. After taking tickets for the journey, the plaintiff went on to the platform, by the side of which the train was standing, and there saw one of the porters employed by the defendants, named Bishop. As the train was not to start for a few minutes, the plaintiff asked Bishop to take charge of the luggage, to put it into a compartment, and to look after it, while the plaintiff went to the refreshment-room. Bishop replied it would be all right, and he would look after the luggage. Bishop put the plaintiff's luggage, including the dressing-bag, into a first-class compartment, and placed it upon the seats: he turned the key of the door of the compartment. The plaintiff and his wife then went to the refreshment-room; they returned to the train shortly before the time appointed for starting. Bishop said it was all right, and the door of the compartment being still locked he unlocked it for the plaintiff and his wife: they entered the compartment and found that the bag was missing. The bag was not recovered.

The jury, in answer to questions put by the judge, found that the compartment and not the luggage-van was the proper place to put the bag, having regard to the common usage at the defendants' station; that Bishop was acting within the scope of

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his employment by the defendants, and that he took charge of the bag as their servant and not as the plaintiff's; that there was no negligence on the part of either the defendants or their servants which conduced to the loss of the bag; that the plaintiff was not guilty of negligence which conduced to the loss of the bag; that the bag was stolen, but there was no evidence to shew by whom it was stolen.

The learned judge directed the judgment to be entered for the defendants. The plaintiff appealed.

1877. Nov. 21, 22. *Grantham, Q.C.*, and *R. E. Webster*, for the plaintiff.

Metcalfe, Q.C., and *Lindsell*, for the defendants.

The arguments are sufficiently stated in the judgment. In addition to the authorities mentioned in the judgment the following were cited: *Macrow* v. *Great Western Ry. Co.* (1); *Gatliffe* v. *Bourne* (2); *Middleton* v. *Fowler* (3); *Upshare* v. *Aidee.* (4)

Cur. adv. vult.

Jan. 14. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

COTTON, L.J. In this case the facts are as follows:—[The learned judge stated them as above.] It has been found that neither the company nor the plaintiff was guilty of negligence. The company, therefore, cannot be held liable unless they are to be held to have undertaken the liability of common carriers in respect of the bag, the loss of which is the cause of complaint in this action.

The liability of a common carrier is, as compared with that of other bailees, exceptional. He is answerable for the loss of goods intrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted), the goods of which he, as

(1) Law Rep. 6 Q. B. 612.
(2) 4 Bing. N. C. 314; in error, 3 Man. & G. 643.
(3) 1 Salk. 282.
(4) Comyns, 25.

common carrier, is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment, at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner; and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The rule and the reason for it are thus stated by Lord Chief Justice Holt in *Coggs* v. *Bernard*. (1) "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." This, though apparently a stringent rule, was founded on good sense. But if this implication had been applied to goods, of which in consequence of the act of the owner the carrier had not during their carriage the exclusive or absolute control or care, it would, in our opinion, have been unreasonable. So to apply it would have been to extend a contract of insurance, which the law had originally implied, because the carrier had the exclusive, or, at least, absolute control and care of the goods, to goods as to which his position was entirely different. When the reason for raising an implied contract does not exist, the implication ought not to be made, and in none of the earlier cases, which dealt with and established the common carrier's liability, was a contract of insurance implied in respect of goods over which he had not absolute control. In our opinion, as regards goods in such position, no such contract ought to be implied.

The next question, then, is whether it can be said that goods

(1) 2 Ld. Raym. 918.

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which at the request of a passenger are put into the carriage in which he travels, are under the control and care of the company to such an extent that a contract of insurance on the part of the company can be implied. They are put into that carriage, because they may be required by the passenger during the journey, or because he wishes to take special care of them and to have them under his eye, or because he desires to take them away with him as soon as the train stops. At all events, they are put in that carriage at the request or with the consent of the passenger, in order that, or in such a manner that, he has some control over them during the transit. While the train is in motion, the company can exercise no control whatever over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons, who by reason of the passenger's own negligence may be tempted or enabled to injure or destroy the goods, or deprive the owner of them. If the company are, in respect of the goods, liable as common carriers, though this loss may happen by no default of the company, but by reason of the passenger's own negligence, they must nevertheless make good the loss, or at least must do so unless they can fulfil the difficult burden of proof that the negligence of the passenger occasioned the loss. This would not, in our opinion, be reasonable.

But it was urged that, at least when the owner is reasonably absent from his carriage at stations during the journey, the company must be liable, and that the contract of the company may be considered as a contract of insurance, with an exception that while the train is in motion and the owner in the carriage with some charge of the goods, there should be a different liability. But this would be implying a new form of contract, entirely different from the contract of insurance implied in the case of a common carrier.

Again, it is said that the company have been held to be common carriers of passengers' luggage, which is put into the van or other place appropriated for the purpose, and from this it is argued that, the company, being common carriers of passengers' luggage in a passenger train, are so of all such luggage carried in the train. But the real question is, whether, as regards the particular goods,

there is an implied contract of insurance. This must depend on the circumstances under which these goods are received, and though the company are common carriers of goods, and do receive some passenger's luggage carried by a passenger train under circumstances from which a contract of insurance can be implied, it does not follow that this is the case as regards articles which, though carried by the same train, are received and carried under different circumstances. As regards that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he is to travel, we think, for the reasons given above, that there is no sufficient ground laid upon which a Court can properly make a presumption that the company carry them under a liability or implied contract to carry them safely at all hazards, the act of God and of the Queen's enemies alone excepted.

But then it is urged that, if the company are not liable to the extent insisted on, they are not in any way liable for the luggage of a passenger placed at his request and with their assent in the carriage in which he is to travel, and that such an entire absence of liability is unreasonable, and therefore that the only reasonable conclusion is to imply a common carrier's liability. But, in our opinion, it cannot properly be said that the company, if not liable as common carriers, incur no liability: the company undertake to carry the passenger; they equally undertake to carry his luggage or goods, which with their consent are placed with him in the carriage in which he is; and they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company therefore must, according to ordinary principles, be held liable in respect of those goods, as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself.

This is our view on principle; it remains for us to consider the decisions bearing on this question.

Cohen v. *South Eastern Ry. Co.* (1) is the only case cited which

(1) 2 Ex. D. 253.

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came before a court of error. The question in that case was not as to luggage carried by the passenger in the carriage with him, and all that the Court decided was that the company were liable for the loss of passenger's luggage carried in the same train, but not in the same carriage with him, when occasioned by the negligence of the servants of the company.

The plaintiff also relied on *Robinson* v. *Dunmore*. (1) The decision in that case is not in point, for the defendant had expressly contracted that the goods should be safely carried, and the Court held that he was not relieved from this contract by the plaintiff sending his servant with the defendant. It is true that Mr. Justice Chambre, in giving judgment, stated that it had been held that a coach proprietor is liable as a common carrier for a passenger's luggage, though placed under the eye of the passenger. But in such a case it is obvious that the servants of the coach proprietor did, although the passenger was on the coach, retain an absolute control over the goods in question, just as much as if the passenger had not been there.

The cases of *Le Conteur* v. *London and South Western Ry. Co.* (2), *Butcher* v. *London and South Western Ry. Co.* (3), *Richards* v. *London, Brighton, and South Coast Ry. Co.* (4), may with more reason be relied on for the plaintiff. These were all cases where the claim against the company was for the loss of articles placed by or at the wish of a passenger in the carriage, in which he travelled or intended to travel. In the first case, though judges to whose opinion great weight is due, expressed themselves in terms which favour the contention that the company is liable, the decision was on other grounds in favour of the company, and the opinion expressed by the judges may be explained as suggested by Mr. Justice Willes in *Talley* v. *Great Western Ry. Co.* (5) In the other cases of *Butcher* v. *London and South Western Ry. Co.* (3) and *Richards* v. *London, Brighton, and South Coast Ry. Co.* (4), the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company were liable as common carriers. In *Butcher* v. *London and South Western Ry.*

(1) 2 B. & P. 416.
(2) Law Rep. 1 Q. B. 54.
(3) 16 C. B. 13; 24 L. J. (C.P.) 137.
(4) 7 C. B. 839; 18 L. J. (C.P.) 251.
(5) Law Rep. 6 C. P. 44, at p. 49.

Co. (1), however, there was some evidence of negligence on the part of the company. And none of the cases were before a court of error. Moreover, in a later case of *Talley* v. *Great Western Ry. Co.* (2), the Court of Common Pleas decided that the company was not liable for the loss of a portmanteau placed at the passenger's request in the same carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only neglecting to get back into the carriage in which his portmanteau had been placed. In that case Mr. Justice Willes, who delivered the judgment of the Court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate and exclusive control of the company, and articles placed by a passenger, or at his request, in the carriage wherein he is to travel, and shewed that his opinion was that the company are not liable as absolute insurers of articles so placed, but are only liable in the event of negligence of some part of the duty which pertained to them.

Under these circumstances, we are of opinion that this Court is not bound by the authorities to decide that the company are liable, if in the opinion of the Court the company cannot on principle be held to have undertaken the liability of common carriers in respect of the plaintiff's bag, that is, to have contracted to become insurers of it.

For the reasons above stated, we are of opinion that they did not so contract, and that the judgment in favour of the company should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *William A. Crump & Son.*
Solicitor for defendants: *S. Corpe.*

(1) 16 C. B. 13; 24 L. J. (C.P.) 137. (2) Law Rep. 6 C. P. 44.

1878
March 6.

[IN THE COURT OF APPEAL.]

DAVIS *v.* THE FLAGSTAFF SILVER MINING COMPANY OF UTAH.

Prohibition—Inferior Court—Counter-claim beyond Local Jurisdiction—Judicature Act, 1873, *ss.* 89, 90.

Under ss. 89 and 90 of the Judicature Act, 1873, an inferior court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action.

ACTION brought in the Lord Mayor's Court upon two promissory notes, given by the secretary of the defendants' company, for the sums of 100*l.* and 400*l.* respectively.

The defendants pleaded never indebted, payment, set-off, and a counter-claim. By the counter-claim the defendants, after setting forth transactions in the United States between the plaintiff and the defendants with respect to a mine situate at Utah, claimed, inter alia, that certain sub-contracts executed in America should be declared to be not binding on the defendants, and that the plaintiff should be ordered to pay to them money alleged to have been there received by him on their behalf amounting to 89,000*l.*

A summons was taken out before Field, J., to shew cause why a writ of prohibition should not issue against the defendants' counter-claim and was referred by the learned judge to the Court.

The plaintiff's affidavit stated that the circumstances upon which the counter-claim was founded arose without the jurisdiction of the Mayor's Court, namely, at Utah, in the United States of America, and could not be sued for in the Mayor's Court as upon an original claim.

Feb. 21. *Talfourd Salter*, *Q.C.*, and *A. Cock*, for the plaintiff, moved the Common Pleas Division accordingly.

The Mayor's Court cannot entertain this counter-claim, it being founded on matters arising beyond the jurisdiction, and it should

therefore be struck out. By the Judicature Act, 1873, s. 89 (1) an inferior court is empowered to deal with every counter-claim, subject however to the provision in s. 90 that, where any defence or counter-claim involves matter beyond the jurisdiction, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. The power to dispose of the whole matter in controversy is limited to the demand and to the defence arising within the jurisdiction, and no relief can be given on this counter-claim which refers to matters beyond it.

[GROVE, J. Must not the objection to the jurisdiction be taken in the Mayor's Court, which will presumably regard the terms of s. 90 when dealing with the counter-claim ?]

That Court will not entertain an objection to its jurisdiction unless made by a plea with which no other plea can be joined.

(1) By the Judicature Act, 1873, s. 89, "Every inferior court which now has or which may after the passing of the Act have jurisdiction in equity or in law and in equity and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

By s. 90, "Where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for the High Court or any division or judge thereof if it shall be thought fit, on the application of any party to the proceeding, to order the whole proceeding to be transferred from such inferior court to the High Court or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar or other proper officer of the inferior court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein."

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Where a superior court is clearly of opinion, both with reference to the facts and the law, that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition: *Worthington* v. *Jeffries* (1), and the writ may apply to so much only of the subject-matter of the controversy as is beyond the jurisdiction: Viner's Abr. tit. Prohibition (E *a*) 3.

Edward Clarke, and *Grosvenor Woods*, shewed cause. The Mayor's Court may, at least, entertain the whole matter in controversy, although debarred from giving relief upon the counter-claim as to matters arising beyond its jurisdiction; and this Court will not assume that the inferior tribunal will infringe the provisions of the section by giving such relief if the subject of the counter-claim should appear to have arisen beyond the jurisdiction. The terms of the enactment operate as a prohibition, and no other is necessary at the present stage of the action. The plaintiff could, if he chose, apply to have the whole proceedings removed to the High Court, under the proviso in s. 90, but he wishes to try the action in a court where complete justice cannot be done unless the counter-claim is adjudicated upon. If the construction of the Act be doubtful, the present motion should be refused or the rule enlarged with liberty to declare in prohibition: *Whinney* v *Schmidt* (2).

[GROVE, J., referred to *Taylor* v. *Nicholls* (3).]

The mere suggestion that the Mayor's Court may exceed its jurisdiction is not enough to entitle the plaintiff to a writ of prohibition. The motion should be dismissed or adjourned, so as to enable the defendants to apply for the removal of the proceedings to the High Court.

T. Salter, Q.C., in support of the application, objected to the transfer or adjournment of the case and asked for judgment.

GROVE, J. I am of opinion that we should not grant the prohibition. The extent to which we can exercise a discretion in refusing it is perhaps uncertain. In *Taylor* v. *Nicholls* (3) Brett, J., thought it "obligatory on the Court to grant a prohibition if it be

(1) Law Rep. 10 C. P. 379. But see *Chambers* v. *Green*, Law Rep. 20 Eq. 552.

(2) Law Rep. 8 C. P. 118.

(3) 1 C. P. D. 242.

clear upon the law and the facts that the inferior tribunal is proceeding without jurisdiction." The same rule was laid down in *Worthington* v. *Jeffries* (1), to which our attention was called during the argument for the plaintiff.

It was, for the purposes of the argument, assumed that on the claim the Mayor's Court had jurisdiction. Then the defendants set up a defence, on various grounds; and also a counter-claim, which is said to be without the jurisdiction. It is contended that as soon as we find from the affidavits that there is a counter-claim beyond the jurisdiction of the Mayor's Court, we ought to prohibit the Court—not from entertaining the case altogether but—from entertaining so much of it as is without the jurisdiction. By so doing we should allow the action to proceed to a certain extent in one court, while a part of the action is reserved for litigation in a superior court, and allow the plaintiff to sue upon causes of action which are within the jurisdiction, and as to which the defendant would be undefended, because his defence might consist of matters outside the jurisdiction. This would be such an extraordinary inconvenience that the Court would not sanction it, unless peremptorily obliged by law so to do. But ss. 89 and 90 of the Judicature Act, 1873, seem to me framed to prevent that injustice, so far at least as regards the counter-claim. Sect. 89 of the Act enlarged the power of an inferior court by enabling it to administer relief and remedies which it could not previously afford, and to give the like effect to every ground of defence or counter-claim (subject to the provision next thereinafter contained) in as full and ample a manner as might and ought to done in the like case by the High Court of Justice. That certainly is not a restrictive enactment. Then follows s. 90, declaring that "where in any proceeding before any such inferior court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or duty of the Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff, and the defence thereto." I read that clause as tending to restrain the superior court from granting prohibition, because it says that although the defence and counter-claim of the defendant

(1) Law Rep. 10 C. P. 379. But see *Chambers* v. *Green*, Law Rep. 20 Eq. 552.

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involves matter beyond the jurisdiction, yet such defence shall not affect the competence of the Court to deal with the whole matter so far as relates to the demand of the plaintiff, and the defence thereto, "but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim." The Court below may entertain the action and the defence—so much thereof as it has power to deal with—but it is not to grant relief beyond what it has jurisdiction to administer. So far from this being an argument for prohibiting the inferior court, it seems by enabling that court to sever what it can entertain from what it cannot, to be against the grant of prohibition which would indeed be of an unusual kind, for it would be novel practice to prohibit a portion of the defence, and not the whole action. A passage was cited from Viner's Abridgment, where it was decided that if a suit in the Ecclesiastical Court relates to the revocation of a will of both land and goods, the Court may prohibit the suit in respect of the land because that is beyond the jurisdiction. That is intelligible enough, for there were virtually two separate suits, over one of which the Ecclesiastical Court had no jurisdiction. Very different is the present case, where we are asked to prohibit not the action but the defence only, and to prevent the Mayor's Court dealing with the defence in any way, and ascertaining upon the facts whether any or what part of it is within the jurisdiction, or whether the tribunal has power to try it. It seems to me that the section is so framed as to expressly provide for such a case as this, and my opinion is confirmed by the proviso that "it shall be lawful for the High Court, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred." If prohibition in respect of part of the proceedings had been contemplated, the terms used would surely have been "the whole or any part" of the proceedings. I think that the use of the word "whole" shews that the power given is to transfer not a part, but the whole proceeding. Upon my construction of the section I think that we have not power to grant the present application.

LINDLEY, J. I am of the same opinion. The question seems

to turn on the true construction of ss. 89 and 90. One object of part vi. of the Judicature Act, 1873, was apparently to enable courts of inferior jurisdiction to do complete justice in actions intrusted to them, or in respect of which they had originally jurisdiction; and I think s. 89 was framed to enable that to be done by the inferior court which can be done under ss. 24 and 25 by the superior court; that is, to enable a party to set up in the inferior court whatever answer he may have. This would render it necessary to provide for counter-claims, founded on matters with respect to which the court of inferior jurisdiction had no power to deal. That is provided for in s. 90 thus: It contemplates a state of things like the present, viz., an action properly brought in an inferior court, and a defence of matters not properly triable in that court. "Where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose"—not merely of the claim, but—"of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto." Stopping there, the section means that, if a person chooses to bring an action in an inferior court, he must be prepared to meet defences which could not be made the subject of an action in the court itself; or, in other words, that by selecting an inferior court the plaintiff cannot deprive the defendant of defences which he could not assert there. It would be unjust if such an advantage could be obtained over the defendant. I think the section is directed against that very state of things. It says that although the inferior court shall, as regards a defence involving matters beyond the jurisdiction, entertain it so far as may be necessary to defeat the claim, an inferior court is not to go further and to grant relief exceeding that which the Court has jurisdiction to administer "to the defendant upon any such counter-claim." Apply that to the present case. The plaintiff sues for 500*l.*, the defendant sets off a counter-claim of, say 80,000*l.*: perhaps this Court could, if it should think fit, grant a prohibition as to the difference, which would be no more than merely repeating in the form of a writ of prohibition what the statute itself says. It is not necessary to

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decide whether such prohibition could or could not be granted, for the plaintiff does not ask for it. But that seems to me the utmost that could be done. I think this application should be dismissed with costs. It is quite obvious that this action should be transferred to the superior court.

Application dismissed.

March 6. The plaintiff appealed.

Talfourd Salter, Q.C., for the plaintiff.
E. Clarke, and *Grosvenor Woods*, for the defendants.

BRETT, L.J. I am of opinion that this judgment should be affirmed.

The plaintiff has made a claim in the Mayor's Court in a matter over which it is admitted the Mayor's Court has jurisdiction. To that claim the defendant has pleaded certain defences, and also set up a counter-claim. In considering the affidavit which has been made and which is not answered, I have come to the conclusion that the subject-matter of the counter-claim is in respect of matters which happened out of the jurisdiction of the Mayor's Court, and could not have been sued for in that court as upon an original claim. Then the question is whether the Mayor's Court should be prohibited from entertaining any question arising on the counter-claim. That depends upon the construction of the Judicature Act, 1873. I think the object of the Judicature Acts was to enable the Court, before which any controversy was brought, to determine all the matters, which at that time might be existing between the parties, and that every enactment of the Judicature Acts, and every part of the rules made under those Acts, are always to be construed having regard to that fundamental object.

Sect. 89 of the Act of 1873 deals, amongst other things, with admiralty jurisdiction given to an inferior court. Now in the Admiralty Court (which although in one sense a superior court, yet was a court with a limited jurisdiction) at the time of passing of the Judicature Act, where the plaintiff's matter of controversy was within the jurisdiction of the Admiralty Court, and the defendant's part of the matter of controversy involved matter beyond its jurisdiction, if in order to do equity between the parties it was necessary

to entertain matters of controversy brought forward by the defendant, which if they had been brought forward by the defendant as a plaintiff could not have been entertained, but having been brought forward by him as a defendant they ought to be entertained, in order that equity might be done between the parties, the rule of law was that the Admiralty Court exercised jurisdiction over those matters. That being the rule of law in the Admiralty Court, it seems to me, having regard to the fundamental object of the statute, that the legislature by s. 89 meant to give to inferior courts a power similar to that which the Admiralty Court had acted upon under like circumstances, and therefore that the meaning of that section is that where a plaintiff in an inferior court brings an action which is within its jurisdiction, and the defendant brings forward a defence or a counter-claim, which if it had been brought forward as an original claim by the defendant could not be entertained for want of jurisdiction of the inferior court, yet in order that the inferior court might give a final decision in all matters in controversy between the parties and do equity between them, that court shall have jurisdiction to entertain the matters brought forward by the defendant as a defence or by way of counter-claim. The words of s. 89 are most extensive; that section says "every inferior court shall, as regards all causes of action within its jurisdiction, have power to grant, and shall grant in any proceedings before such court, such relief, redress, or remedy as might or ought to be done in the like case by the High Court of Justice." But then it goes on, "and shall in every such proceeding," that is, in every case where a cause of action by the plaintiff is within its jurisdiction, "give such and the like effect to every ground of defence or counter-claim equitable or legal (subject to the provisions next hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." If the phrase "subject to the provision next hereinafter contained" were omitted, that section would enable the inferior courts to give effect to every ground of defence or counter-claim in as full and ample a manner as might be done by the High Court of Justice. Therefore, where the plaintiff's cause of action was within the jurisdiction of the inferior court that section would remove all barriers of jurisdiction

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in regard to defences or counter-claims, and would leave the inferior courts, with regard to defences and counter-claims, free to exercise all the jurisdiction of the superior courts. But that extensive power of dealing with the ground of defence or counter-claim is "subject to the provision next hereinafter contained;" we must therefore refer to s. 90 to ascertain to what extent this extensive power is limited. Now s. 90 says: "When in any proceeding before such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court"—thereby shewing the intention of the former section that such counter-claims, namely those which should involve matter beyond the jurisdiction of the Court, should be entertained—"such defence or counter-claim"—that is, one which involves matter beyond the jurisdiction of the Court—"shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy." So far it certainly enacts that the competence of the Court shall not be affected to deal with a counter-claim which involves matter beyond the jurisdiction of the Court. I think the whole matter in controversy must contain both the demand and that which is the defence proper to the demand and the counter-claim. They are all in controversy, therefore the "whole matter in controversy" contains them all. But that phrase, "the whole matter in controversy," comes now to be limited, "so far as relates to the demand of the plaintiff and the defendant and the defence thereto." It is true that those words create a difficulty, because the words "the defence thereto" might be construed so as to be limited only to a defence and not to include a counter-claim. But having regard, as I said, to the fundamental object of the Judicature Act, which is to give complete redress, at all events between the litigants with regard to all matters in controversy between them, it seem to me that we ought not to construe "the defence thereto" to be confined to a defence proper, such as might have been a defence in cases where no counter-claim was allowed before the present legislation, but that the words "defence thereto" include a counter-claim, so far as the counter-claim can be used under the recent legislation as a defence to a claim. Then the section enacts in what respect the inferior court shall have no jurisdiction; "but no relief exceeding that which the

Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim." My construction of those words is, that the inferior court may deal with the counter-claim, which, if it were an original claim, would be beyond its jurisdiction, to the extent of answering the claim of the plaintiff, but not further.

It has been said that "the matter beyond the jurisdiction" is confined only to amount; but I cannot think so. The matter may be beyond the jurisdiction of the inferior court in respect both of amount and locality. The jurisdiction of an inferior court may be limited in amount, but it is always limited with regard to locality; and it seems to me that it would be defeating the object of this section, and the fundamental object of this legislation, if we were to say that the inferior court might deal with a counter-claim which was beyond its jurisdiction in amount, but might not deal with a counter-claim which was beyond its jurisdiction in locality. A counter-claim might be beyond the jurisdiction of the inferior court because some of the facts with regard to it, which must be proved in order to support it, might have arisen outside the locality of the jurisdiction. But it was never meant to confine the power of the inferior court to deal only with those matters which are within the limits of its local jurisdiction. It was meant to give power to the inferior court to deal to the extent I have said with all matters of counter-claim, whether they are beyond its jurisdiction in respect to amount, or whether they are beyond its jurisdiction in respect of locality, or both. That being so, where the counter-claim is pleaded, if it is shewn that that counter-claim if treated in a superior court might give rise to a decree in favour of the defendant, then if that counter-claim is beyond the jurisdiction in other respects, s. 90 limits the power of the inferior court to entertain it only so far as it is a defence to the demand. This construction gives effect to all the words of both sections. But then, considerable injustice might be done in such a case as the present. If the inferior court were entitled to deal absolutely with this counter-claim, even to the extent to which I have limited it, great hardship might arise, for it might not be possible to try the action without a commission to Utah. The Mayor's Court has no power to grant a commission for the examination of witnesses. If there were no remedy, great injustice

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might be done: but there is a remedy, for where a counter-claim is beyond the jurisdiction of the Court, in the sense in which I have been speaking, the High Court may remove the whole subject matter of the litigation before itself; and then it will have all its powers of dealing with it. So that in the present case I have no doubt, at some stage of the proceedings, the High Court will remove the whole matter. But Mr. Salter asks us to say that the Mayor's Court should have power to retain the claim, and should not be able to entertain the counter-claim to any extent; but that the defendant should sue for the amount of his counter-claim in the superior court: to that we cannot accede. The application is for a prohibition against the Mayor's Court entertaining the counter-claim, and such an application cannot be granted.

With regard to the proper time for removing the cause from the Mayor's Court into the High Court, we are not called upon to express any opinion.

I am of opinion that the judgment ought to be affirmed.

COTTON, L.J. I am also of opinion that the appeal must fail. The counter-claim raises questions which, if they had been made the subject of a claim by the defendant against the plaintiff by original action, the Mayor's Court would have had no jurisdiction to entertain. The only question is, whether ss. 89 and 90 of the Judicature Act, 1873, give the Mayor's Court power to enter into the subject-matter of the counter-claim, and if so to what extent. Section 89 deals with two matters. It deals with the relief to be granted to a plaintiff in an inferior court, if that court has jurisdiction to entertain the action independently of the Judicature Act, 1873. It also gives rights to the defendant. The words are, "shall give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." Nothing is said as to defence or counter-claim arising without the jurisdiction, but the words are general. I think the fair construction of that part of the enactment is, that if a defendant has been brought into an inferior court then he may raise any matter of defence or counter-claim which he could have raised if the action

had been originally commenced in the High Court. That extensive right is limited by the words "subject to the provision next hereinafter contained." That provision is contained in s. 90. The words at the beginning of that section strongly shew that counter-claims, which can be entertained under the previous section, may involve matter beyond the jurisdiction of the inferior court; it does not say that the counter-claim shall not be entertained, but it provides that "such defence or counter-claim shall not affect the competence or duty of the Court" to do what? "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto." The whole difficulty arises upon the use of the word "defence," because while "defence" only is mentioned in the latter part of this clause, in the previous part the words are "the defence or counter-claim;" but I think it would be wrong to give to the words "the whole matter in controversy," the limited construction "to dispose of the claim and the defence thereto." The whole matter in controversy is to be disposed of, and that referring to the previous part of the section may be matter beyond the jurisdiction of the Court. I think that the inferior court has jurisdiction to enter into all the matters involved both in the claim and counter-claim, though in the counter-claim there may be matters beyond the jurisdiction of the Court, to see whether the plaintiff has a good demand, and if he has, whether by means of the counter-claim, the defendant can protect himself effectually against that demand. Then there comes a limitation, "but no relief can be given." That is to say, no judgment shall be given to the defendant on matters beyond the original jurisdiction of the Court. The defendant is to use the counter-claim as a shield, but not so as to enable him by means of a judgment to obtain payment of a sum of money beyond the amount of the plaintiff's claim.

On the application of either party, the Court may transfer the whole proceeding to the High Court, and there, not only the plaintiff's claim and the defendant's counter-claim, but the whole matter in controversy, will be dealt with, and the Court will give the plaintiff or the defendant such a judgment or decree as in justice either party may be entitled to. I am of opinion that the prohibition ought not to issue, and the appeal should be dismissed.

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THESIGER, L.J. I am of the same opinion. The construction of s. 90 of the Act of 1873 appears to be in itself perfectly plain. And when it is read in connection with the preceding section, and also with one of two other sections of the Judicature Act of 1873, its construction is free from doubt.

Prior to the Judicature Acts there were a variety of claims, although resulting in the payment from one party to another of a sum of money, which could not be made the subject of set-off, and the courts were precluded from doing complete justice between two parties in a particular litigation. That difficulty was removed by the passing of ss. 24 and 25 of the Judicature Act, 1873, for by those sections every division of the High Court was enabled to do complete justice as regards all claims which might exist between the actual parties to a litigation, and, under certain circumstances third persons might be brought in as parties to the action; and amongst other things, in addition to a set-off as it existed before the passing of the Judicature Acts, a defendant was entitled to set up claims, although sounding in damages and not actually constituting a legal defence, so that such claims might be treated with regard to the judgment as a set-off to the plaintiff's claim: a further machinery is provided by Order XIX., Rule 3, by which a defendant may set up by way of counter-claim against the claim of the plaintiff any right or claim, whether sounding in damages or not, and such counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce, not two judgments, but a final judgment both on the original and on the cross claim.

That being the state of the legislation under the Judicature Acts, so far as regarded the proceedings of the High Court, the legislature had to deal with courts of inferior jurisdiction, and it dealt with them under ss. 89 and 90. Sect. 89 contains a general provision, first, as regards causes of action; and, secondly, as regards defences or counter-claims. As regards causes of action, the jurisdiction is limited to the inferior court according to the locality, or according to the amount, as it existed prior to the passing of the Judicature Acts; but subject to that limitation power is given to the Court to deal with those causes of action "in as full and ample a manner as might and ought to be done in the

like case by the High Court of Justice." Then the legislature had to deal with the question of defence and counter-claim; and, reasoning à priori, I think anybody who had dealt with the subject, and had observed the mode in which the legislature had dealt with judicial proceedings in the High Court, would say that, if a plaintiff chose to bring his action in an inferior court, justice would require that the defendant in that action should be entitled to set off, at all events to the extent of the plaintiff's claim, any demand which the defendant might have, wherever or however that demand might have arisen; otherwise a plaintiff might be enabled by choosing a particular court to obtain speedily a judgment involving the payment of money by a defendant, while at the same time the defendant might have a very much larger claim which he could only sue for in a superior court. That case is provided for by s. 89 in general terms: in every such proceeding the inferior court shall give such and the like effect to every ground of defence or counter-claim. I think it is clear, when we come to the reading of s. 90, that "every ground of defence or counter-claim" is intended to mean what the words themselves in their natural import do mean, namely, every ground of defence or counter-claim, in whatever locality it may have arisen, or under whatever circumstances it may have arisen. Then it was felt that some limitation must be put on these general terms, otherwise it would be raising the jurisdiction of the inferior court to an extent beyond what the convenience of the public would require, and accordingly we find the limitation "subject to the provision next hereinafter contained." Looking to the object which would necessarily be had in view, we would expect to find that s. 90 would at all events go to this extent, namely, would enable the defendant to set up, by way of counter-claim or set-off, so much of any demand he might have as would be equivalent to the amount claimed by the plaintiff. It seems to me that s. 90 provides in clear terms for that, because it says "where in any proceeding before any such inferior court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court"—it is dealing therefore not merely with a defence involving matter beyond the jurisdiction of the Court, but also a counter-claim involving matter beyond the jurisdiction of the Court—"such defence or

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counter-claim," namely, the defence or counter-claim involving matter beyond the jurisdiction of the Court "shall not affect the competence or duty of the Court to dispose of" what? not the mere plaintiff's claim, but "the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto."

I agree with what has fallen from Lord Justice Brett as to the meaning of the word "defence." I agree that the word "defence" does not limit the words used in the earlier part of the section. I think that there is a reason which distinctly points to that being the correct view. When the legislature are dealing in this section with the counter-claim or defence, which is mentioned in the earlier part of the section, we find the word "such" before defence, but in this latter part the words are "to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto." Thereby the legislature use words which are very comprehensive to shew that they intended to deal with the whole matter to a certain limited extent as regards amount, namely, as regards the amount of the claim of the plaintiff. I think the words which follow, "but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim," merely mean this: as soon as a judgment is obtained by the defendant of sufficient amount to overtop or rather equal the claim of the plaintiff, then if the counter-claim is primâ facie beyond the jurisdiction of the Court, the Court shall hold its hand, and as regards the overplus of the counter-claim, that must be dealt with by some other Court. That being so, although in this case the counter-claim which is set up and the relief which is asked for is of a larger amount than that which would be sufficient to equal the claim of the plaintiff, yet that would not justify an application for a prohibition. The Court in giving judgment would have to give special relief to the defendants as regards their counter-claim, at all events to the extent necessary to equal the plaintiff's claim. Until the Mayor's Court has shewn by some act that it is exceeding its duty or jurisdiction, the plaintiff has no ground of complaint.

I am of opinion that in this case there is nothing in the course of conduct pursued by the defendants in the Mayor's Court which

would justify an application for a prohibition at this stage of the proceedings.

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Appeal dismissed.

Solicitor for plaintiff: *Sykes.*

Solicitors for defendant: *Ashley & Tee.*

[IN THE COURT OF APPEAL.]

Feb. 6.

THE UNION BANK OF LONDON *v.* LENANTON.

Shipping—Transfer—Assignment—British Ship built in order to be sold to Foreigner and to be delivered at Foreign Port—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 7—*Merchant Shipping Acts*, 1854, 1862 (17 & 18 *Vict. c.* 104), *ss.* 19, 55, 57; (25 & 26 *Vict. c.* 63), *s.* 3.

A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to the plaintiff for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that Act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:—

Held, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute.

Held, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute.

INTERPLEADER issue, to try the right of the plaintiffs as against the defendant in the ship *Edhem*.

At the trial at the Middlesex sittings on the 7th and 11th of June, 1877, before Pollock, B., without a jury, the following facts were proved: John and William Dudgeon formerly carried on business in partnership as shipbuilders in London and at the Sun Ironworks at Millwall and Cubitt Town. On the 9th of January, 1873, J. Dudgeon, on behalf of his firm, entered into a contract with certain persons on behalf of the Turkish Azizié Steamship Company for the construction of two steamships for 31,250*l.*, payable by instalments; the ships to be delivered to the representatives of the Turkish company at the Golden Horn. The ships were built, and one of them delivered pursuant to contract; the other, called

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Edhem, was held by J. & W. Dudgeon by way of security and lien for the payment of a final instalment of 7000*l.*, and remained in their shipping yard at Cubitt Town.

On the 1st of April, 1875, W. Dudgeon died, having by his will appointed J. T. Donald his executor.

By an agreement dated the 21st of May, 1875, between John Dudgeon and the Union Bank of London (the plaintiffs), which recited that in consideration of 28,000*l.* advanced by the bank to John and William Dudgeon, John Dudgeon had agreed to charge all the estate and interest of the firm in (amongst other things) the steamship *Edhem* with the repayment of the sum of 28,000*l.*; and that the ship was built under a contract, and the firm had a lien upon the ship in respect of a sum of 7000*l.* then due to the firm, it was agreed that for the purposes of such confirmation and security, and in consideration of 7000*l.*, part of 28,000*l.*, the right, interest, and lien of himself, J. Dudgeon, or of the firm of John & William Dudgeon, should remain and be held as a security for the payment to the bank by John Dudgeon, or the firm of J. & W. Dudgeon, of the sum of 7000*l.* and interest thereon; and J. Dudgeon did charge all the right and interest of himself and of the firm of J. & W. Dudgeon in the ship with the payment to the bank of the sum of 7000*l.* and interest thereon, and did also agree, upon the request of the bank, to execute any such assurance of the ship and of the sum of 7000*l.* and interest, in such manner as the bank might require, for further securing the payment of the money.

On the 10th of November, 1875, the assets of J. & W. Dudgeon not being sufficient to meet their creditors, Robert Fletcher was appointed receiver, and entered into possession of the estate and effects of J. Dudgeon and J. & W. Dudgeon. On the 5th of January, 1876, John Dudgeon was found and declared to be a person of unsound mind, and by an order of the Lord Chancellor, dated the 21st of February, 1876, A. J. Dudgeon, L. Dudgeon, and R. Fletcher were appointed committees of his person and estate. On the 24th of June, 1876, an agreement was made between the committees of the lunatic, Donald the executor of W. Dudgeon, and the plaintiffs' bank, by which the creditors of J. Dudgeon would be paid 3*s.* 4*d.* in the pound upon their respective debts; and,

amongst other things, the committees and the executor should absolutely assign to the bank all the interest of them or either of them, J. Dudgeon or the estate of W. Dudgeon, in the steamship *Edhem*, and in all payments and moneys which might be received or recovered in respect of the ship from the Turkish company. On the report of the Master in Lunacy this agreement was confirmed and approved of by the Lord Chancellor. On the 22nd of August, 1876, the plaintiffs' bank took possession (amongst other things) of the ship *Edhem*. On the 13th of September the sheriff levied under a fi. fa. issued on a judgment signed in an action of *Lenanton* (the defendant in the present interpleader) v. *Dudgeon*. The sheriff's officer seized, amongst other things in the shipping yard at Cubitt Town, the ship *Edhem*. The ship was completely built and had been tried. The agreement of the 21st of May, 1873, had not been registered under the Bills of Sale Act, nor had the ship *Edhem* been registered under the Merchant Shipping Act, 1854.

At the close of the case it was contended, on behalf of the defendant, that the ship *Edhem* was a British ship, and the document dated the 21st of May, 1875, was an assignment of her, which must be registered either under the Bills of Sale Act or under the Merchant Shipping Act, 1854 (1), and that, therefore, no property in the ship passed to the plaintiffs.

(1) By the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, every bill of sale of personal chattels shall be void unless the same be filed in the manner pointed out in that section.

By s. 7, the expression "bill of sale . . . . shall not include the following documents . . . transfers or assignments of any ship or vessel, or any share thereof. . . . ."

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 19: "Every British ship must be registered in manner hereinafter mentioned, . . . and no ship hereby required to be registered shall, unless registered, be recognised as a British ship; and no officer of customs shall grant a clearance or transire to any ship hereby required to be registered for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship, upon being required to do so, produces to him such certificate of registry as is hereinafter mentioned; and if such ship attempts to proceed to sea as a British ship without a clearance or transire, such officer may detain the ship until such certificate is produced to him."

By s. 55: "A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may

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It was contended on behalf of the plaintiffs that they had a good title to the ship *Edhem* under the documents of the 21st of May, 1875, and the 24th of June, 1864, which was a parol arrangement under sanction of the Court of Chancery; and that no registration was required.

The learned judge, after argument, directed judgment to be entered for the plaintiffs.

The defendant appealed.

Feb. 5. *Butt, Q.C.*, and *Witt*, for the defendant.

Feb. 6. *Holl, Q.C.*, and *Aspinall*, for the plaintiffs.

COCKBURN, C.J. The instrument of the 21st of May, 1873, professes to be an assignment, and is an agreement in the nature of a bill of sale; but it has not been registered under the Bills of Sale Act (17 & 18 Vict. c. 36), and if it came within that Act then the assignment would be bad for want of registration. But I think the exception in the Bills of Sale Act clearly shews that the statute was not intended to apply to a ship.

Then comes the question whether the ship *Edhem* was a vessel which required to be registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) as a British ship; and if so, whether, not being registered, an agreement purporting to pass the property

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be sufficient to identify the ship to the satisfaction of the registrar. . . ."

By s. 57: "Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar."

By 25 & 26 Vict. c. 63, s. 3, it is declared that the expression "beneficial interest," whenever used in the second part of the principal Act, includes interests arising under contract or other equitable interests; and the intention of the said Act is that . . . . without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property.

in the vessel is sufficient. I confess I had some doubt, whether, although the Act of Parliament expressly requires that a British ship shall be registered, and then goes on to deal with the mode of passing property in a British ship so registered upon sale, before you can pass the property in such ship, you must necessarily register her with a view to bring her within the operation of s. 57, which requires the transfer of a registered ship to be registered. But I do not think it necessary to decide this case on that ground. I do not think that this was a British ship within the contemplation of the Act of Parliament. She was built, it was true, by a British subject, and on looking at the contract between the British builder and the foreign purchaser for the construction and transfer of the vessel, it appears to me impossible to say that the property in the ship was to pass from the builder to the foreign purchaser, until she was actually delivered at the spot where by the contract the delivery to the Turkish company was to take place. It was specially provided that the Turkish company should have the ship delivered at a particular place for a certain sum of money. Being till delivered the property of a British owner, she was in a certain sense a British ship; but I cannot think that she was a British ship within the contemplation of the statute. The statute was intended to apply to ships intended to be the property of a British owner. That was not the case here. As soon as the vessel crossed the sea she was intended to be transferred to a foreign owner, and never intended from that hour to be a British ship. Therefore, although she was a British ship in the larger sense of the term, I do not think she comes within the Act of Parliament which has reference to British ships.

I therefore think the judgment of Pollock, B., was right, and must be affirmed.

BRAMWELL, L.J. I am of the same opinion. I have no doubt that the property in an unregistered ship may pass otherwise, and indeed must pass otherwise, than by the bill of sale required by the Merchant Shipping Act, 1854. The 17 & 18 Vict. c. 104, s. 19, says: "Every British ship must be registered in manner hereinafter mentioned unless, &c.;" this is not a case within the exception. If those words stood alone there might be an obligation upon the

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owner of a British ship to have her registered, but that is not so, because certain consequences follow from the omission, but there is no penalty imposed for not doing it; that is to say, a person is not punished, or sent to prison, or indicted for omitting to register. "No ship hereby required to be registered shall, unless registered, be recognised as a British ship, and no officer of Customs shall grant a clearance." The consequence of not registering is, that the owner does not get the benefits of his British ownership. Sect. 55 does not say "no ship or share therein shall be transferred except by bill of sale," but "a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale." That is only applicable where the ship is a registered ship. This was not a registered ship. Even if there was an obligation to register —and I think it is clear that there was not—the statute does not say, because the obligation has not been observed, the ship may not be assigned. It must also be remembered that this enactment is one piece of legislation, for it proceeds: (1) "Every bill of sale for the transfer of any registered ship, or for any share therein, when duly executed shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale, and shall endorse the fact of such entry having been made . . . and all bills of sale of any ship or shares in a ship shall be entered in the register book in the order of their production to the registrar." I incline to think that the consequence of not producing the transfer is that a subsequent transferor or incumbrancer takes precedence—whoever gets first on the register takes precedence. Messrs. Dudgeon, therefore, were not bound to register the ship *Edhem*, and the consequences of their not doing so are those I have mentioned. Further, there is no absolute prohibition of the assignment otherwise than by bill of sale, because that is applicable only to registered ships, and there is no prohibition of the assignment, if unregistered, for the reason I have already mentioned. I have also to remark that the plaintiffs

(1) Sect. 57.

would be entitled to an equitable interest in this ship without registration.

It was also contended that the assignment of the ship was void under the Bills of Sale Act, and we are asked to read the enactment in the Bills of Sale Act as though it had in it the words "transfer or assignment of a ship pursuant to the Merchant Shipping Act." I am of opinion that we cannot so read it. It is difficult to say why we cannot, except to say that no reason has been given why we should. It is said that the words used are similar to those used in the Merchant Shipping Act. That is true; but the words in the Bills of Sale Act are general words, and such as a person would use who intended to frame a wide and comprehensive enactment.

I am of opinion that the judgment should be affirmed.

BRETT, L.J. I am of opinion that the property in the ship passed to the plaintiffs. She was a ship whose construction was completed. She belonged solely to British owners, but it never was intended that she should be registered as a British ship. I therefore agree with my Lord Chief Justice, that not being intended to be ever registered she was not a ship which was brought within the Merchant Shipping Act, 1854. But supposing that argument not to be sufficient, in point of fact she was not registered; and I think that the only transfer to which the prohibition of the Merchant Shipping Act relates is a transfer of a registered ship. If it were not for the statute no registration of the transfer would be necessary, and the transaction which would otherwise be good, but which is forbidden by s. 55 of the Merchant Shipping Act, is the transfer of a registered ship. Therefore, it seems to me that this transaction was not made void by reason of the Merchant Shipping Act, 1854.

Then it is said the transfer is not available by reason of the Bills of Sale Act. If the Bills of Sale Act has been conterminous with the Merchant Shipping Act, so that it could be said that a ship which is not to be dealt with under the Merchant Shipping Act must be dealt with under the Bills of Sale Act, then the ship would come within the provisions of the Bills of Sale Act. But the Bills of Sale Act is not conterminous with the Merchant Shipping Act.

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The Bills of Sale Act excepts all ships, that is, whether British ships or foreign ships, or whether registered ships or not registered ships. Therefore, although the ship is not registered, and although the transfer is not within the Merchant Shipping Act, yet it is a ship, and is excepted from the Bills of Sale Act; therefore a ship not registered is a thing the transfer of which is not dealt with either by the Merchant Shipping Act, or the Bills of Sale Act, and therefore the transfer is governed by the Common Law, and is good although there has been no registration. The appeal must fail, and the judgment should be affirmed.

COTTON, L.J. I am of opinion that the appeal must fail. I think, putting aside the Bills of Sale Act, the bank had a good and valid title to the ship. The instrument under which they claim is the agreement of the 21st of May, 1875, it recites what is supposed to be the interest of Messrs. Dudgeon, not stating that interest, in my opinion, correctly, for the agreement deals with them as having only a lien or charge upon the ship. [The Lord Justice read the operative part of the agreement.] Now, in equity that would be a good contract, not transferring the property in the ship, but giving the bank a right in equity to say that whatever interest Messrs. Dudgeon had in the ship should be transferred to them as a security for their debt. I do not propose to enter upon the question whether this is a ship which, under the Merchant Shipping Act, 1854, ought to have been transferred by a duly registered bill of sale; but in the Act of 1862 (25 & 26 Vict. c. 63, s. 3), there is an express provision giving a shipowner in equity a right to transfer his interest in his ship by an instrument or contract not sufficient to pass the legal title. It is this: "Without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them, in respect of any other personal property." So that independently of the question whether the *Edhem* was a British ship within the meaning of the Merchant Shipping Act (as to which I agree with my Lord Chief Justice and the other members of the Court), the point as

to the validity of the charge is especially met by the section I have referred to. Here there was an equitable interest in the ship granted by contract to the bank by Messrs. Dudgeon: even assuming that the ship *Edhem* is a British ship, that contract would have been effectual, independently of the Bills of Sale Act, to give them a title to the ship at the time when the execution of the 13th of September was issued. Then the question still arises, does the Bills of Sale Act make that title of no effect as against the execution creditor? It would be a bill of sale within the Act unless it is taken out of the Act by the exception contained in the interpretation clause. Although the Bills of Sale Act in terms deals with bills of sale, assignments, and transfers, a contract effectual in equity, giving the person a right to the thing in specie, is an assignment or transfer within the meaning of the Act. The exception is, "This Act is not to include transfers or assignments of any ship or vessel, or any share thereof." Does this document come within that exception? I am of opinion that it does. The argument is that we ought to read those words as "transfers or assignments of any ship or vessel duly registered under the Act relating to British ships;" but no such words are to be found in the exception.

My opinion, therefore, is that the bank have a good title to the ship as against the defendant.

Judgment affirmed.

Solicitors for plaintiff: *Lyne & Holman.*
Solicitor for defendant: *Pritchard.*

1878
April 8.

HIGGS *v.* SCHRADER.

Practice—Solicitor and Client—Charging Order under 23 & 24 *Vict. c.* 127, *s.* 28.

QBD. 623

The motion for a charging order under 23 & 24 Vict. c. 127, s. 28, must be made before the judge who tried the cause.

THIS was an action tried before Hawkins, J., at the Middlesex Sittings, 1878, when a verdict was found for the plaintiff.

An order having been made by Field, J., under 23 & 24 Vict. c. 127, s. 28 (1), at the suit of the plaintiff's solicitor, charging the sum recovered with the amount of his taxed costs incurred in the action,

Daniells, for the plaintiff, moved to set aside the order, on the ground that it was not competent to the learned judge to make it. He referred to *Hemish* v. *Sutton, In re Fiddey* (2), where it was held that a charging order under this statute must be made in the branch of the Court to which the suit was attached; and where James, L.J., says (3), "It is quite inconsistent with the object of the clause that one judge should exercise such a discretion as to

(1) 23 & 24 Vict. c. 127, s. 28, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for *the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending*, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and, upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for *such Court or judge* to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to *such Court or judge* shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a bonâ fide purchaser for value without notice, be absolutely null and of no effect as against such charge or right: Provided always that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."

(2) Law Rep. 6 Ch. 865.

(3) Law Rep. 6 Ch. at p. 868.

the amount of charge to be made in a cause which had been tried before another judge."

C. S. Scott, contrà, relied on *Wilson* v. *Hood*, *In re Seaman* (1). There the cause was tried before Crompton, J., and the application was made to the Court of Exchequer: it was objected that it should have been made to Crompton, J., but Bramwell, B., said: "The words 'Court or judge' must mean the Court or the judge who himself represents the Court, and cannot apply to the judge at nisi prius, who may know nothing of the facts,—as, for instance, where the cause is referred or the facts set out in the form of a special case." As to *In re Fiddey* (2), he contended that that case was susceptible of explanation by reason of the assignment of causes to different divisions in the Court of Chancery."

LORD COLERIDGE, C.J. The whole object of the section is to give a discretion to the Court or judge before whom the matter is heard. Here, the cause was tried before my Brother Hawkins. He, therefore, was the proper person to make the order, being the only person who could exercise a discretion upon the merits of the case.

HUDDLESTON, B., concurred.

Order set aside (3).

Solicitor for plaintiff: *C. Quilter.*

Solicitors for defendant: *Walter Moojen & Son.*

(1) 3 H. & C. 148; 33 L. J. (Ex.) 204.

(2) Law Rep. 6 Ch. 865.

(3) See *Catlow* v. *Catlow*, 2 C. P. D. 362. The cause was tried in the Court of Common Pleas at Lancaster, and the application for a charging order was made in this Court; and it was held by Grove and Lindley, J.J., upon the authority of *Wilson* v. *Hood* (2 H. & C. 148, 33 L. J. (Ex.) 204), that the motion was properly made here.

1878
March 2.

FIRTH *v.* THE BOWLING IRON COMPANY.

Negligence—Injury to Cattle from defective and improper Fencing—Landlord and Tenant.

The plaintiff and the defendants respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease the defendants were bound to fence the land in their occupation for the benefit of the lessor and his tenants. About twenty years ago the predecessors of the defendants had fenced their land with wire rope, and the defendants allowed this fence to remain, and from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces, and died in consequence:—

Held, that the defendants were liable to compensate the plaintiff for the loss of the cow.

APPEAL from the decision of the judge of the County Court of Yorkshire holden at Bradford.

The action was brought to recover 27*l.* 16*s.*, as damages for the loss of a cow, the property of the plaintiff, by reason of the negligence of the defendants in the use and enjoyment of their property. At the trial the following facts were proved:—

1. The plaintiff at the time of the alleged grievance was, and for many years past had been, the tenant from year to year under Mr. Savile of a farm called Lower Chatt's Farm, at Hunsworth.

2. The defendants are a limited company incorporated in 1870 under the Companies Act, 1862, and prior to their incorporation their predecessors in title had for several years carried on extensive colliery and iron works, under the style of the Bowling Iron Works.

3. At the time of the alleged grievance the defendants were, and they and their predecessors in title had for several years been, the lessees under Mr. Savile of the mines of coal and ironstone underlying (amongst other lands) the farm occupied by the plaintiff. This farm contains about forty-two acres, divided into several inclosures, and used principally for pasturing milk cows.

4. In one of the inclosures (containing about ten acres of

pasture) there is a large pit hill or bank which prior to the incorporation of the defendants had been formed by their predecessors in title from the spoil obtained in sinking a coal-shaft. This pit hill had been for some years, and was at the time of the alleged grievance, unused by the defendants, except that a tramway forming part of the defendants' works, and used by the defendants, ran over it.

5. By the terms of their lease the defendants were bound to protect (amongst other things) their tramways by the erection of stone walls or by posts and rails of a specified description, for the benefit of the lessor, his heirs or assigns, and his and their tenants.

6. About twenty years ago the predecessors in title of the defendants placed round the base of the pit hill a fence, constructed of two parallel lines of wire rope supported by posts. The wire ropes had originally been used for the purposes of the colliery, but owing to wear had ceased to be be suitable for such purposes.

7. The defendants allowed this fence of wire rope to remain, and from time to time mended or stopped any broken places with wooden rails, and thus prevented cattle straying on the pit hill or tramway.

8. From long exposure the strands of iron composing the rope rusted, decayed, and separated into pieces, some of which fell to the ground and lay hidden in the grass of the plaintiff's pasture, and were liable to be taken up by the cattle grazing there.

9. In October, 1867, two heifers of the plaintiff died in consequence of their taking up pieces of wire with the grass while feeding in this pasture. The carcases of the heifers were examined, and a piece of wire several inches long and in a rusted and decayed state (which no doubt had formed part of the wire rope) was found in the stomach of each of the heifers. The plaintiff complained to the landlord's agent, Mr. Lipscomb, and afterwards wrote to the defendants the following letter:—

"Lower Chatt's Farm, October 10th, 1867.

"To the Bowling Iron Company,

"Gentlemen,—I am requested by Mr. Lipscomb, agent to the late Earl of Scarborough, to inform you that I have lost two

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FIRTH v. BOWLING IRON CO.

heifers from your wire roping. The cattle has got it into their stomachs with grass, and it has killed them, and I want recompense for them.

"I remain, respectfully yours,

"Martha Firth."

This letter was not answered, and the plaintiff did not take any legal proceedings to try to enforce her rights against the defendants.

10. In the autumn of 1876, the cow the subject of this action was feeding in the same pasture. During the autumn she was observed to be getting very thin and losing strength, and became so ill that she was killed, which was the prudent and proper course. On examining her carcase, a piece of wire about eight inches long was found imbedded in the inner side of the pericardium, and was the cause of the illness resulting in her death.

11. The piece of wire had been picked up by the cow while grazing in the pasture, and was a decayed portion of the wire rope, which had in some way, without fault on the part of the plaintiff, fallen upon the land which she occupied.

12. The plaintiff's loss owing to the death of the cow was shewn to be the sum claimed, 27*l.* 16*s.*

The question for the opinion of the Court is whether, upon the facts, the defendants are liable for the death of the plaintiff's cow. If the Court is of opinion that the defendants are liable, the judgment entered for the plaintiff for 27*l.* 16*s.* will stand: but, if the Court is of opinion that the defendants are not liable, judgment is to be entered for the defendants. (1)

(1) A copy of the judgment of the county court judge accompanied the case. The ground upon which he held that the plaintiff was entitled to be compensated by the defendants for the injury she had sustained was, that they had "used and enjoyed their property in such a manner as to damage her in the use and enjoyment of her property, and that by this misuser of their own property to the plaintiff's damage they had infringed the rule, Sic utere tuo ut alienum non lædas." And, in stating the facts which induced him to come to this conclusion, the learned judge said,—"For reasons of their own, and with a view to their own interests, the defendants have thought proper to utilise part of the plant which had become useless or unfit for colliery purposes, and apply it for a purpose for which it was not designed nor ordinarily fit. It has from time to time required repair, and the defendants have repaired it, but only to such extent and in such manner as their interests have required. The nature of the material used for the fence rendered it liable to decay from

Swift (*Wills, Q.C.*, with him), for the defendants. There was no duty or obligation on the defendants to fence in any particular way, as regards the plaintiff. When the defendants acquired the adjoining land in 1870, the fence was there, and the notice referred to in the case was not given to them, but to their predecessors in title; and it was not a fence of an unusual description. They cannot, therefore, he charged with negligence either in placing or keeping it there. There was no evidence as to how the wire came into the stomach of the cow; and no evidence of negligence on the part of the defendants, nor any legal duty on them for the breach of which they could be liable, any more than in the yew-tree case, *Wilson* v. *Newbery* (1), where Melior, J., says,—"It is not alleged that the defendant clipped the yew-trees, or that he knew the yew-trees were clipped, or that he had anything to do with the escape of the yew clippings on to his neighbour's land.

Cave, Q.C. (*Wilberforce* with him), for the plaintiff. A person who for his own purposes brings on to his land or keeps there anything likely to do mischief, must take care of it at his peril, and is answerable for the natural consequences of its escape: *Fletcher* v. *Rylands.* (2) If his mode of using his land causes damage to his neighbour, he must make compensation: *Lambert* v. *Bessey* (3); *Vaughan* v. *Menlove* (4); *Barnes* v. *Ward* (5); *Bonomi* v. *Backhouse* (6); *Todd* v. *Flight.* (7) Where cattle suffer injury through defect of fences which the defendant is bound to maintain, as, by falling down a disused shaft, *Groucott* v. *Williams* (8), or by being

causes which they must have known would operate and be beyond their control, and which would produce results they could not prevent; and these results have wrought damage to the plaintiff in the lawful use and enjoyment of her own property. This damage having occurred was made known to the defendants, and they continued with such knowledge to use and enjoy their property in the same manner, producing a repetition of the damage to the plaintiff by similar means. It is in the power of the defendants to prevent this damage by adopting a different mode of fencing; but they insist upon their right to continue this mode of fencing, because it would seem to be pecuniarily more beneficial to them."

(1) Law Rep. 7 Q. B. 31.

(2) Law Rep. 3 H. L. 330.

(3) T. Raym. 421.

(4) 3 N. C. 468.

(5) 9 C. B. 392.

(6) E. B. & E. 622; 34 L. J. (Q.B.) 181; 9 H. L. C. 503.

(7) 9 C. B. (N.S.) 377.

(8) 32 L. J. (Q.B.) 237.

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attracted to a hay-rick which is so badly constructed that it falls upon and kills the animal, *Powell* v. *Salisbury* (1), the defendant is responsible. In *Wilson* v. *Newbery* (2) the question arose upon demurrer. The evidence set out in the case shews that the defendants failed to exercise that degree of care in the use of their land which they were bound to do, and, if notice was necessary, they had it.

Swift, in reply, referred to *Greenland* v. *Chaplin* (3), where Pollock, C.B., said: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

[DENMAN, J., referred to *Humphries* v. *Cousins*. (4)]

[The case of *Hurdman* v. *North Eastern Ry. Co.* (5) was also cited.]

Cur. adv. vult.

March 2. The judgment of the Court (Denman and Lindley, JJ.,) was delivered by

LINDLEY, J. Since the argument of this case we have considered the recent decision of the Court of Appeal (*Hurdman* v. *North Eastern Ry. Co.* (5)) which was cited to us, and are satisfied that we need not defer our judgment.

After stating the facts, his Lordship proceeded:—Reliance was placed on the notice given by the plaintiff when she first suffered loss of her cattle from the cause now complained of. There was no evidence to shew that the letter containing the notice reached those to whom it was addressed, nor that any answer to it was sent by them. But, even supposing that the letter had been received by the predecessors of the defendant company, we should go too far were we to hold such notice to be good notice in law to the defendants. Nevertheless, even without the notice, this action seems to us, upon the facts of the case, to be maintainable. The

(1) 2 Y. & J. 391.
(2) Law Rep. 7 Q. B. 31.
(3) 5 Ex. 243, 248; 19 L. J. (Ex.) 293.
(4) 2 C. P. D. 239.
(5) Ante, 168.

nature of the wire was known to the defendants; that parts of it should fall on the plaintiff's land was a natural result of the decay of the wire; and the pieces being hidden in the grass were naturally liable to be swallowed by the cattle grazing there. The defendants, therefore, seem to us to be answerable for the injury to the plaintiff's cow which was caused by the natural result of their acts. We concur in the judgment of the county court judge; and we also accept the decision in *Humphries* v. *Cousins* (1) as extending the principle upon which this action is in our opinion maintainable.

The only case causing any doubt in our minds was *Wilson* v. *Newbery*. (2) But after consideration we think it is distinguishable, for the reason suggested by Mr. Cave, viz. that the decision was given on demurrer: the facts were obscure, and the declaration did not shew in what part of the defendant's land the yew-trees grew, nor how the clippings came on to the land of the plaintiff. Therefore we do not think that case ought to guide our decision, when all the other cases in the Queen's Bench which have been cited are clearly in favour of the present plaintiff.

Our conclusion is that this action can be maintained on principle, and that the judgment below should be affirmed.

Wills, Q.C., asked for leave to appeal.

GROVE, J., doubted whether the Court had power to grant it. No leave therefore was given. (3)

Judgment affirmed.

Solicitor for plaintiff: *H. T. Wood.*
Solicitor for defendants: *Field & Roscoe.*

(1) 2 C. P. D. 239.

(2) Law Rep. 7 Q. B. 31.

(3) The question as to the power of the Divisional Court to grant leave to appeal in these cases has recently been under the consideration of the Court of Appeal. See *Crush* v. *Turner*, W. N. 1878, p. 139; where the Court (Brett, Cotton, and Thesiger, L. JJ.,) held that an appeal will lie, notwithstanding s. 20 of the Appellate Jurisdiction Act, 1876.

1878
May 17.

MORGAN AND OTHERS *v.* DAVIES AND ANOTHER.

Landlord and Tenant—Notice to quit—Customary Half-year.

4 CPD 135
8 QBD 90
5 12

A six months' notice to determine a yearly tenancy commencing on one of the ordinary Feast-days, means a "customary six months," that is, from one of the usual quarter-days to the quarter-day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently, a notice served on the 26th of March, to quit on the 29th of September then next, is not a valid notice.

ACTION in the county court of Cardigan holden at Lampeter, to recover possession of a messuage and lands in the county of Cardigan, held by the defendants as yearly tenants at the annual rent of 30*l.*, and also to recover 23*l.* 2*s.* for mesne profits. The cause was tried on the 16th of February, 1878, when it was admitted that the defendants occupied the premises in question as yearly tenants of one David Richards, that the tenancy commenced on the 29th of September, that a notice was served by Richards upon the defendants on the 26th of March last requiring them to quit on the 29th of September then next, and that since the 26th of March last and before the commencement of the action Richards had conveyed all his interest in the premises to the plaintiffs.

The county court judge held that the notice had not been served in time, and gave judgment for the defendants, with costs.

On the 18th of February, the plaintiffs' solicitor applied for a copy of the judge's notes, to enable him to appeal by motion against the decision, pursuant to 38 & 39 Vict. c. 50, s. 6 (1), but did not get them.

(1) 38 & 39 Vict. c. 50, s. 6: "In any cause, suit, or proceeding other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the Court to which such motion shall be made shall seem fit. And, if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers. And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of

M'Call, on the 20th of February, and on four or five subsequent occasions, the last being on the 10th of May, obtained orders "that the time for hearing the application by way of appeal be extended until further order, to enable the judge who tried the action to furnish a copy of his notes to the parties," and that the proceedings in the action be in the meantime stayed; and on the 17th of May, upon an affidavit of service of the above order upon the registrar of the county court at Lampeter, and of a renewed application for a copy of the notes, in reply to which the plaintiff's solicitor was informed that "the judge declined to supply him with a copy of the notes taken by him at the trial, on the ground that the notes so taken by him were not such as are contemplated by s. 6 of 38 & 39 Vict. c. 50," the motion was renewed, with a suggestion that the production of the judge's notes might under the circumstances be dispensed with, which it was submitted the Court might in its discretion do, notwithstanding the Order of the 22nd of January, 1877. (1)

[GROVE, J. I doubt whether we have power to interfere with the judge of the county court: he has been guilty of no disobedience of a direct order of this Court for which we could attach him.]

It would be competent to the Court to make an order under 19 & 20 Vict. c. 108, s. 43. (2)

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law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons; and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

See *Turner* v. *Great Western Ry. Co.* 2 Q. B. D. 125.

(1) "It is ordered that motions under the 6th section of 38 & 39 Vict. c. 50 shall be made in the Queen's Bench, Common Pleas, or Exchequer Divisions of the High Court of Justice only upon the days appointed by those Divisions for hearing appeals from inferior Courts; and no such motion shall be made by way of appeal from any county court unless a copy of the judge's notes, signed by the judge, shall have been handed to the proper officer in Court, unless otherwise ordered."

(2) "No writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior Court or a judge thereof, upon an affidavit of the facts, for a rule or summons

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[GROVE, J. I do not think it will be necessary to adopt that course, though, to say the least of it, the conduct of the judge in withholding his notes is extraordinary. (1) I do not think the rule of January, 1877, makes the production of the notes an absolute condition to the party's right to appeal: it precludes him from moving without a copy of the notes, "unless otherwise ordered." We will hear your motion.]

The only question at the trial was whether a six months' notice to determine a yearly tenancy which commenced on the 29th of September served on the 26th of March was a sufficient notice. If "half a year," viz. 183 days, will do, the notice would have been in time if served on the 28th. This point was not taken in *Papillon* v. *Brunton* (2): there the notice was written and posted on the 25th of March, and the only question was whether the jury might presume that it was delivered at the office of the landlord's agent (an attorney) within business hours on the same day; and it was held that, in the absence of evidence to the contrary, the jury might so presume upon proof that it was posted in time. There are, however, authorities which, as far as they go, seem adverse to the plaintiff's contention. In *Keily* v. *Quin* (3), a notice served on the 28th of March to quit on the 29th of September following (the gale days being the 25th of March and 29th of September), was held not to be a sufficient notice to determine a tenancy from year to year commencing on the 29th of September. The Court there assume the "reasonable half-year's notice" to be from the Feast of the Annunciation to the Feast of St. Michael. In *Roe* d. *Durant* v. *Doe* (4), a notice served on the 28th of September, to quit on the ensuing 25th of March, was held to be

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calling upon such judge or officer of a county court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the superior Court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment; and in any event the superior Court or the judge thereof may make such order with respect to costs as to such Court or judge shall seem fit."

(1) This was afterwards satisfactorily explained.

(2) 29 L. J. (Ex.) 265.

(3) 2 Jones (Ir. Ex.) 593.

(4) 6 Bing. 574.

a sufficient half-year's notice to quit, though less than 182 days; Tindal, C.J., saying,—"A customary half-year is sufficient." (1) In *Right* d. *Flower* v. *Darby* (2) the notice was served, as here, on the 26th of March, to quit on the 29th of September following; and Lord Mansfield, C.J., and Buller, J., held it to be insufficient, the latter saying,—"The case in the Year Books (3) requires half a year's notice; but here there is less than half a year's notice." But, in *Rogers* v. *Kingston Dock Co.* (4) Page Wood, V.-C., held, that, where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy.

GROVE, J. The Vice-Chancellor, in the case last cited, was dealing with the construction of an agreement, not with reference to a Feast-day tenancy. The whole thing depends upon custom. Eyre, B., in *Doe* d. *Puddicombe* v. *Harris*, cited arguendo in *Right* d. *Flower* v. *Darby* (2), assumes the customary notice to be from Feast day to Feast day; and the judgment in that case is very explicit to the same effect. Tindal, C.J., in *Roe* d. *Durant* v. *Doe* (5) intimates the same opinion. I am therefore of opinion that the county court judge was right in holding the notice given in this case to be insufficient.

LINDLEY, J. I agree with my Brother Grove that the judge was right in holding that the notice to quit was insufficient. The case of *Keily* v. *Quin* (6) seems to me to be conclusive. But the other three cases of *Doe* d. *Puddicombe* v. *Harris*, *Right* d. *Flower* v. *Darby* (2), and *Roe* d. *Durant* v. *Doe* (5) are almost equally so.

Rule refused.

Solicitors for defendants: *Morgan & Gilks, for Davies, Aberystwith.*

(1) And see Cole on Ejectment, 48; Woodfall's Landlord and Tenant, 11th Ed. p. 313.
(2) 1 T. R. 159.
(3) 13 H. 8, fo. 15. b.
(4) 34 L. J. (Ch.) 165.
(5) 6 Bing. 574.
(6) 2 Jones (Ir. Ex.) 593.

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April 15.

TURNBULL AND OTHERS *v.* JANSON.

Practice—Taxation of Costs—"Instructions for Brief"—Refreshers—Allowance for scientific Witnesses qualifying themselves—Attendance of such Witnesses at the Trial—Rule 8 *of "Special Allowances*, 1875."

The charges for "Instructions for Brief," for "scientific witnesses qualifying themselves to give evidence," for "copies of documents furnished to counsel," and for "refreshers to counsel," are purely in the discretion of the master.

Rule 8 of the "Special Allowances" in the scale of 1875 so far qualifies the rule of 1853 as to allowance to witnesses, as to enable the master in his discretion to allow so much for the attendance of scientific witnesses at the trial as shall appear to him to be "just and reasonable."

The same rule authorizes the master to allow in the charge for "Instructions for Brief" the reasonable expense of such witnesses qualifying themselves to give evidence.

THIS was an action brought by the plaintiffs, owners of the steam-vessel *Mary*,—an iron vessel of extremely light draught (27 inches only, her tonnage exceeding 400,) intended for river navigation,—to recover from the defendant, as one of the underwriters on a policy for a voyage from the Clyde to Trinidad, a total loss on his subscription. The material pleas were,—1. Unseaworthiness,—2. That the vessel was not lost by perils insured against,—3. Misrepresentation and concealment.

The cause was tried before Cleasby, B., at the London sittings of Michaelmas, 1876, and after a long hearing a verdict was found for the defendant, which verdict was sustained upon appeal.

The main contention on the part of the defendant was, that, by reason of the mode of construction of the *Mary*, the thinness of her plates, and the slenderness of her scantling, she was not seaworthy, in the sense of her ability to resist the tensile and compressive straining to which such a vessel must necessarily be exposed on a voyage across the Atlantic, and which in fact resulted in her breaking in two whilst steaming across the Bay of Biscay. For the purpose of making out this defence, a number of experienced naval architects, engineers, and shipwrights were called, to shew (amongst other things) what scientific appliances might have been resorted to in order to counteract the inherent weakness of the vessel.

Upon the taxation of the defendant's costs, the master disallowed, on a charge of 315*l.* for "Instructions for Brief," the sums paid to these scientific witnesses for conferences, calculations, and experiments with a view to the proper instruction of counsel; allowing only 20 guineas for "Instructions," and 50 guineas for getting up the evidence, or "qualifying." He also disallowed the cost of copies of the evidence taken on the Board of Trade inquiry into the loss of the vessel, of the original specification, plans, and drawings of the vessel, and of the reports of experts thereon. He further disallowed a considerable proportion of the "refreshers" paid to counsel at the trial, allowing only 10, 7, and 5 guineas respectively. He further disallowed the greater part of the sums paid to the scientific witnesses for their attendance at the trial; allowing them only at the rate of 1 guinea per day, according to the scale of 1853. He further disallowed the expense (9*l.* 12*s.* 1*d.*) of the examination and correction of the printed proofs of evidence agreed between the parties to be printed for use on an appeal.

A summons was taken out for a review of the taxation upon these (amongst other) objections; but was dismissed by Field, J.

M'Leod (*Butt, Q.C.*, with him,) moved to rescind the order of Field, J. 1. The allowances of 21*l.* as "Instructions for Brief," and 52*l.* 10*s.* for the witnesses' qualifying themselves, were clearly inadequate in a case of this kind. The successful party is entitled, under Rule 8 of the Additional Rules of 1875, to the reasonable expenses of witnesses qualifying for examination: *Mackley* v. *Chillingworth.* (1) Rule 29 provides that, "as to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances." The master here could not have taken into consideration the nature and importance of the inquiry involved.

(1) 2 C. P. D. 273.

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[LOPES, J. In the exercise of his discretion under that rule, the master is also to take into consideration the other fees and allowances to the solicitor and counsel."]

What has been done here is not carrying out the spirit of the rule, which will be rendered almost nugatory if fair allowances for scientific evidence are not made.

[LOPES, J. The master might have thought two witnesses enough.]

He has not said so in his answers to the objections. (1)

2. Then, as to the attendance of the scientific witnesses in Court. The master has allowed at the rate of 1*l.* 1*s.* per day only to each, assuming that he was bound by the scale of 1853. In *Smith* v. *Buller* (2), 7 guineas a day (something more than the sum charged here) was held by Malins, V.C., to be a moderate allowance for a scientific witness to read up a case for the purpose of giving evidence. (3) That case is conclusive to shew that the old scale of allowances to witnesses no longer binds. The 8th rule provides that, "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed." The charges here were reasonably and properly incurred.

[LOPES, J. If Rule 8 authorizes a new state of things as to witnesses qualifying, you would say that it also qualifies the old scale as to the attendance of witnesses at the trial?]

That is precisely the contention upon this part of the case.

[The master reported that, with respect to the allowance for witnesses qualifying, he had come to the conclusion that 50 guineas was sufficient; and that, as to the attendance of witnesses at the trial, he acted upon the old scale, conceiving it to be unaffected by the new rules.]

[LOPES, J. What was the old allowance in Chancery?]

There appears to have been no exact rule in the Court of

(1) In his answer to this objection the master reported as follows:—"After a very careful and laborious consideration of the whole case, I have exercised my best discretion in the matter; and, amongst other things, I have taken into consideration the cost of procuring the evidence and of qualifying three witnesses."

(2) Law Rep. 19 Eq. 473.

(3) In that case the allowance was 7 guineas for each day the witness was actually engaged in qualifying himself to give evidence.

Chancery. It seems to have been left to the discretion of the taxing officer: Morgan & Davey's Costs, 351. In *Batley* v. *Kynock* (1), Bacon, V.C., says,—"In the case of *Smith* v. *Buller* (2) V. C. Malins plainly assumes that it is the practice to allow a proper remuneration to scientific witnesses. Moreover, how can I depart from that which the officer of the Court,—possessing, and deservedly possessing, the confidence of the Court,—reports to me as being the rule of the Court, when he says 'It is the practice in Equity to allow a proper remuneration to scientific witnesses?' But then he adds, 'But great care is necessary in dealing with such charges as party and party costs.'" It must be assumed to have been the object of the new rules to assimilate the practice at law and in Equity in this respect.

[LOPES, J. If the master is still to be guided by the old rule, it will virtually prevent the solicitor from obtaining scientific evidence at all.]

3. Then, as to the "copies" of papers for the use of counsel,—of 34*l.* 14*s.* 5*d.* charged (and actually paid by the solicitors), the master has disallowed 30*l.* 17*s.* These copies were most important; especially the evidence on the Board of Trade inquiry into the loss of the vessel. All these would have been allowed unchallenged if they had been copied into the briefs. For copies of the plans and drawings of the vessel, for which 15*l.* had been paid, 3*l.* 3*s.* only was allowed.

4. Of the charge of 276*l.* 1*s.* for refreshers for counsel at the trial, the master has taxed off 155*l.* 3*s.* 6*d.* Now, it cannot be denied that this is a matter that is usually left to the discretion of the taxing officer. (3) But, considering the nature and importance of the investigation, it can hardly be said that the master would have exercised an unsound discretion if he had sanctioned the fee of 25 guineas to the leader and 15 guineas each to the other counsel. (4)

(1) Law Rep. 20 Eq. 632, at p. 637.

(2) Law Rep. 19 Eq. 473.

(3) See *Hill* v. *Peel*, Law Rep. 5 C. P. 172.

(4) As to this the master's report was:—"The allowance for 'refreshers to counsel' is that which is acted upon by the masters of the Common Law Division, taking into account the fees given and allowed on the briefs in the first instance."

The rule in Chancery as to refreshers is thus stated in *Smith* v. *Buller*, Law Rep. 19 Eq. 473,—"The rule of the

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5. As to the charge of 9*l.* 12*s.* 1*d.* for "correcting and revising proof of proceedings," this was properly chargeable as part of the cost of printing the evidence for the use of the Court of Appeal, which by agreement of the parties was to be costs in the cause. The printer's bill amounted to 73*l.* 1*s.* That was allowed. The charge for correcting and revising was an incident of the cost of printing, and ought to have been allowed. Under the circumstances, the defendant should not have been limited to the scale allowance of 1*s.* per folio for printing and 2*d.* per folio for examining the proof,

J. C. Mathew, shewed cause. The only point that need be discussed is that which relates to the "Instructions for Brief;" all the rest is purely matter of amount, and not of principle; and the Court will not in that case interfere with the master's discretion: he had before him the briefs and all the circumstances to enable him to judge of the propriety of the charges, which the appellate tribunal has not. The defence at the trial was twofold,—that there was a concealment on the part of the assured of the true nature of the risk; and that sufficient was not done to render a vessel of the peculiar construction of the *Mary* fit to encounter an ocean voyage. When the build of the vessel became known, it scarcely needed the evidence of experts to shew that she could not possibly outlive a storm in the Bay of Biscay. The sum charged as "Instructions for Brief" was 300 guineas, of which 291*l.* 7*s.* was claimed for payments to scientific witnesses, for qualifying themselves to give evidence at the trial and furnishing technical and scientific information to the counsel, to enable them properly to conduct the case. It was for the master to say whether or not that was a reasonable charge for the purpose. In the fair exercise of his discretion he thought three witnesses were enough, and 50 guineas a sufficient remuneration for them. His conclusion was submitted to Field, J., and that learned judge after consideration thought the master was right. The complaint in *Mackley* v. *Chillingworth* (1) was, that the master declined to exercise his

Common Law Courts as to refreshers applies to the hearing of heavy suits in Chancery, whether on written or vivâ voce evidence: but the brief fee may fairly be taken to cover two days, after which refreshers should be allowed."

(1) 2 C. P. D. 273.

discretion under Rule 8 of the Special Allowances, 1875. Here he has exercised it so far as relates to the reasonable expenses incurred in procuring evidence. Then, as to the attendance of the witnesses at the trial, the master seems to have thought himself bound by the old scale, which limited the allowance to engineers and surveyors to 1 guinea per day if resident in the town in which the cause is tried, and 3 guineas if resident at a distance from the place of trial. There is no authority to shew that the new scale has abrogated the old one in this respect: and Rule 28 expressly provides that "the rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and Court of Appeal."

[LOPES, J. What effect do you give to Rule 8 as to "attendance of witnesses?" In *Batley* v. *Kynock* (1), as in *Smith* v. *Buller* (2), the matter was heard upon affidavit.]

Then, as to the disallowance of the charges for the copies of documents.

[LOPES, J. That and the question of "refreshers" was purely for the master's discretion.]

As to the charge for correcting and revising the proof of evidence for the Court of Appeal, that was matter of arrangement. The printer's bill (73*l.* 1*s.*), which was all the plaintiffs consented to pay, was allowed: and that amount exceeded the scale allowance. The master exercised his discretion upon it. It was a compromise.

M'Leod, in reply. The agreement as to the printing was that the reasonable expense of printing (which includes correcting) should be costs in the cause. The obvious intention of Rule 8 as to the attendance of witnesses was, to assimilate the practice at

(1) Law Rep. 20 Eq. 632. (2) Law Rep. 19 Eq. 473.

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law to that which before prevailed in Equity, where the allowance was left to the discretion of the taxing officer.

LINDLEY, J. This is an application by way of appeal against an order of my Brother Field disposing of a summons to review the taxation of the defendant's costs. Now, it is the invariable practice of the Court not to interfere where the matter complained of is in the master's discretion, and he has exercised a discretion, unless some serious mistake has been made. On the other hand, where the decision of the master is upon a matter of principle, the Court will always entertain a motion to review it. As to the "Instructions for brief," "Copies of documents for counsel," and "Refreshers," these are all matters for the master's discretion, and he has exercised it in a manner from which I see no reason to dissent. He has allowed 20 guineas as general instructions for brief, and he has allowed 50 guineas for payments to the witnesses for qualifying themselves. It was clearly matter of discretion; and I am not prepared to say that the master has done wrong. This is not like the case of *Mackley* v. *Chillingworth* (1), where the master had exercised no discretion at all. Upon that, therefore, I think there should be no rule. The same observation applies even more forcibly to the copies of documents and the refreshers. That leaves only two points to be considered, viz. the allowance for the witnesses' attendance at the trial, and the charge for correcting and revising the proofs of the evidence. As to the former of these, the master admits that he did not exercise any discretion, but that he taxed the charges upon the notion that he was bound by the scale of allowances of 1853, and allowed the scientific witnesses at the rate of 1 guinea per day only. I think that is a matter of principle. To hold that the scale allowance of 1 guinea is to be adhered to, is to ignore the 8th rule of the "Special Allowance, 1875," altogether. The bill must go back to the master to exercise his discretion in that respect. If, having done so, he thinks 1 guinea per day enough, he will say so. If he thinks the witnesses were entitled to a larger allowance as between party and party, he will incresae the sum. With regard

(1) 2 C. P. D. 273.

to the charge for correcting and revising the proofs, I do not think we are in a position to interfere. The question turns upon what was the agreement between the parties; and upon that it was the duty of the party appealing against the order to satisfy us, which he has failed to do. The rule will be absolute, therefore, to vary the order to the extent I have mentioned.

LOPES, J. The plaintiffs seek to have the taxation reviewed in respect of five matters. As to the first three, I agree with my Brother Lindley that they are matters purely of discretion, and that there is no ground for the interference of the Court. The fourth, however, involves a question of principle and the construction of the rules of 1875 as to Special Allowances, viz. the allowance for the attendance of witnesses in Court. Rule 8 expressly enables the master to allow such just and reasonable expenses as appear to have been properly incurred in procuring the attendance of witnesses. The master appears to have considered himself bound by the scale of 1853 as a hard and fast rule. In that, having regard to Rule 8, I think he was wrong. On the part of the plaintiff, reliance was placed upon Rule 28. The 8th Rule, however, appears to me to be inconsistent with that. The matter must therefore go back to the master for re-consideration. It will be open to him to increase the allowance or not at his discretion. As to the charge for correcting and revising the proofs, I agree with my Brother Lindley that we have not sufficient evidence before us to enable us to judge as to the propriety of allowing that item. The rule will be absolute to the extent mentioned, but without costs.

Rule accordingly. (1)

Solicitors for plaintiffs: *Parker & Clarke.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

(1) Upon the review, the master increased the allowance to each of the scientific witnesses to 3 guineas per day.

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March 1.

FIELDING, APPELLANT; RHYL IMPROVEMENT COMMISSIONERS, RESPONDENTS.

Bye-Laws, Reasonableness of, and Mode of Publication—Rhyl Improvement Act, 15 *Vict. c. xxxii—Public Health Acts*, 1848, 1858.

Under a local Act incorporating the provisions of the Public Health Acts, 1848 and 1858, bye-laws were made, by which it was amongst other things provided that "every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing delivered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building," &c.; and a penalty not exceeding 5*l.* is imposed for non-compliance with this requirement.

The appellant, without giving such notice or delivering any plans, erected certain structures which from their description could not be intended for residential purposes, and which were found by the justices, upon a case stated under 20 & 21 Vict. c. 43, to have been erected for a temporary purpose only, and to have been intended to be pulled down by the appellant when that purpose was answered:—

Held, that a conviction under the above-mentioned bye-laws could not be sustained, inasmuch as such bye-laws, if intended to apply to such structures, were unreasonable and bad.

By the local Act (passed in 1847) the commissioners were empowered to make bye-laws, which were to be published by being printed and a copy delivered to every person applying for the same, and by painting or placing on boards to be hung up on the front of the office of the commissioners, and also on some conspicuous part of the works or locality to which the same related. Under the Public Health Acts, 1848 and 1858, the prescribed mode of publication of bye-laws is by "printing and hanging the same up in the office of the local board:"—

Held, that a publication in the manner prescribed by the last-mentioned Acts was sufficient.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Rhyl, in the county of Flint, the appellant was convicted of having erected certain new buildings and works within the district of the Rhyl Improvement Commissioners without giving notice to the town surveyor of Rhyl, and without at the same time leaving or causing to be left detailed plans and sections of such buildings and works for the surveyor's approval, contrary to the bye-laws in that behalf duly made by the commissioners, and contrary to the statute.

It appeared that, on the 19th of February, 1877, certain structures of brick and mortar were in course of erection on land of the appellant, situate within the district of the Rhyl Improvement Commissioners. Structure No. 1 was built with 9 inch

walls, and contained two rooms, one of which had a fire-place and chimney. No. 2 consisted of upright walls, some 2 feet thick, in the form of a square, having an opening at either end, and measuring about 12 yards on each side.

The appellant had in contemplation the building of a number of cottages in the immediate neighbourhood of such structures; and the first-mentioned structure was for the storing of tools and the general convenience of the workmen proposed to be employed in the erection of such cottages; the other being for the purpose of a brick-kiln. Both structures were intended to be pulled down by the appellant upon the completion of the cottages.

Notice was sent by the town surveyor to the appellant that he was infringing the bye-laws of the commissioners; to which the appellant replied by inquiring which of the bye-laws was being infringed. The surveyor pointed out that he was infringing the bye-laws relating to the erection of new buildings within the district of Rhyl. No notice in writing, or detailed plans and sections of the structures or of the proposed cottages, were at any time sent or submitted to the surveyor.

The adoption of various sections, including ss. 115 and 116, of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and s. 34 of the Public Health Act, 1858 (21 & 22 Vict. c. 98), by the Rhyl Improvement Commissioners was proved. The bye-laws in question were put in evidence and proved, as was also their printing and publication in conformity with ss. 115 and 116 of the Public Health Act, 1848. A copy of the bye-laws accompanied the case.

On the part of the appellant it was contended,—First, (*a*) That the bye-laws were bad from insufficient publication, and that proof should have been given that such bye-laws were published in the manner directed by s. 205 of the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34) (1), which Act is incorporated in the Rhyl

(1) The Act 10 & 11 Vict. c. 34, s. 200, empowers the commissioners to make bye-laws, and by s. 201 to impose penalties for any breach thereof. Sect. 202 requires such bye-laws to be confirmed by a judge or by the justices at quarter sessions. Notice of their confirmation is, by s. 203, to be published in the local newspapers; and by s. 204 a copy is to be open to inspection at the office of the commissioners. By s. 205 "such bye-laws, when confirmed, shall be published in the prescribed manner, and, when no manner of publication is prescribed, they shall be printed, and the clerk to the commis-

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FIELDING v. RHYL IMPROVEMENT COMMISSIONERS.

Improvement Act, 1852 (1), and that a copy thereof should have been painted and placed on boards and hung upon some conspicuous part of the locality to which the same relate; and that sioners shall deliver a printed copy thereof to every person applying for the same without charge: and a copy thereof shall be painted or placed on boards which shall be hung up on the front or in some conspicuous part of the principal office of the commissioners, and also on some conspicuous part of the works or locality to which the same relate." By the Public Health Act, 1848, s. 115, all bye-laws made by the local board under and for the purposes of *that* Act shall be confirmed by the Secretary of State, and notice of intention to apply for confirmation shall be previously published in some local newspaper, and a copy be open for inspection at the office of the local board. By s. 116, "all bye-laws made by the local board of health in pursuance of this Act shall be printed and hung up in the office of the said local board." By the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 34, "Every local board may make bye-laws with respect to the following matters, that is to say, (2.) With respect to the structure of walls of new buildings for securing stability and the prevention of fires; (3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (4.) With respect to the drainage of buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation: and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down, any work begun or done in contravention of such bye-laws." By bye-law 36 made under this section, "Every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing delivered to the said surveyor or left at his office, and shall at the same time leave or cause to be left at the said office detail plans and sections of every floor of such intended new building drawn to a scale of not less than one inch to every eight feet, shewing the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, cess-pool, ash-pit, well, and other appurtenances; and such plans and sections shall be accompanied by a description of the materials of which the building is proposed to be constructed, and of the intended mode of drainage and means of water supply." The 37th provides that, "If the town-surveyor disapprove of the mode proposed in such notice, section, and plans, he shall within six days after receiving the same give notice to such person of the particulars of such disapproval, and of the requirements of the commissioners in respect to the proposed work; and it shall not be lawful to begin to build or re-build any such building, or to construct any such drain, &c., until the section and plans shall have been approved by the town-surveyor, and no person shall deviate from such approved

(1) 15 Vict. c. xxxii.

the publication as directed by the Public Health Act, 1848, was insufficient: (*b*) That such bye-laws exceeded the powers given by the Acts under which they were made: and (*c*) That they were unreasonable and therefore bad at law, in leaving the approval or disapproval of plans in the hands of the town surveyor,—Secondly, That the structures in question, being only temporary erections, were not "buildings" within the meaning of the bye-laws and of the Act of Parliament under which the bye-laws were framed.

On the part of the respondents it was contended that proof of publication of the bye-laws as required by ss. 115 and 116 of the Public Health Act, 1848, was sufficient, and that the Towns Improvement Act, 1847, did not govern the matter; that the bye-laws in question were just and reasonable; that the structures in question were "buildings" within the meaning of the bye-laws and of the Public Health Act, 1858; that the question whether they were or were not of a temporary character did not become an element in the matter, and, even if it did, that, in face of the fact that no notice whatever had been given by the appellant to the surveyor of the proposed erections or of their character or purpose, or of the cottages proposed to be erected, the respondents were compelled to treat them as ordinary and permanent structures.

The justices, being of opinion that the publication of the bye-laws was properly proved, that they were just and reasonable and within the powers given by the Act of Parliament in that behalf, and that the structures in question were "buildings" within the meaning of such bye-laws, gave their determination against the appellant, in the manner before stated.

The questions for the opinion of the Court were,—First, whether publication of the bye-laws was sufficiently proved,—

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section or plan." And the 41st provides that, "If any owner or person shall construct or cause to be constructed any works, or do any act, or omit to do any act or comply with any requirement of the commissioners or the town-surveyor, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l*., and he shall pay a further sum of not exceeding 40*s*. for each and every day which such works shall continue or remain contrary to the said provisions, and the town surveyor may, if he shall think fit, cause such work to be removed, altered, pulled down, or otherwise dealt with, as the case may require."

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Secondly, whether such bye-laws are just and reasonable and within the powers for that purpose given by the Public Health Acts, 1848 and 1858,—Thirdly, whether the structures in question are "buildings" within the meaning of the bye-laws.

Willes, for the appellant. Publication of the bye-laws in the manner prescribed by ss. 115 and 116 of the Public Health Act was insufficient. Further, the bye-laws, if meant to apply to temporary structures like those here described, are unreasonable. At all events, it was unreasonable in the commissioners to delegate the powers confided to them under their Act of Parliament to the town surveyor.

Clement Higgins, for the respondents. The local board had no power under the Towns Improvement Act, 1847, to make such bye-laws as these. Sect. 4 of the Public Health Act, 1858, expressly enacts that "this Act shall be construed together with and be deemed to form part of the Public Health Act, 1848; . . . . bye-laws framed under this Act shall be subject to confirmation, enforced, and dealt with in all other respects as bye-laws under the said Public Health Act." So that these bye-laws are made according to the provisions of the Acts of 1848 and 1858, and were properly published in the manner prescribed by s. 116 of the Act of 1848, viz. "by printing and hanging them up in the office of the local board, and delivering copies to any rate-payer of the district to which they relate, upon his application for the same." In *Hall* v. *Nixon* (1) a similar bye-law was held to be within the power conferred upon the local board by s. 34 of the Act of 1858, and to be reasonable. Quain, J., there says (2): "By s. 34 express power is given; and the bye-law is within the very words of the section, and is not merely constructively but literally within the enactment. I am therefore entirely unable to see on what grounds we are to hold this bye-law bad: it is clearly neither beyond the powers of the Act nor unreasonable."

It is said that the bye-laws in question are unreasonable because they transfer to the town surveyor the powers vested by the Act in the board. The board, however, can only act through their surveyor. Nor is there anything unreasonable in

(1) Law Rep. 10 Q. B. 152. (2) Law Rep. 10 Q. B. at p. 161.

the penalty imposed: and, even if there were, the part relating to the notice and that relating to the penalties are divisible. The word "building" in the Act and in the bye-laws does not necessarily mean a dwelling-house. If the legislature had so meant, they would have said so. The justices have found that these structures are buildings, and the description given of them shews that they are substantial; and they may at any time be converted into dwelling-houses. It is no answer to say that they were erected for a temporary purpose only: there is no finding to that effect; and it may be years before the contemplated cottages are built.

Willes, in reply. The language of the bye-law in *Hall* v. *Nixon* (1) was different from that of the bye-law 36 now in question.

DENMAN, J. In this case the appellant is appealing against a decision of two justices, by which he was convicted and fined under a bye-law made by the Rhyl Improvement Commissioners. The bye-laws under which they professed to act are the 36th and 41st. It was argued on the part of the appellant that he ought to succeed, first, on the ground that there was no sufficient publication of the bye-laws. The answer given to that argument is I think sufficient. It appears to me that the particular matter of this bye-law is not such as is required by s. 205 of the Towns Improvement Act, 1847, to be published by being "painted or placed on boards which shall be hung up on the front or in some conspicuous part of the principal office of the commissioners, and also on some conspicuous part of the works or locality to which the same relate," but were properly published by being "printed and hung up in the office of the local board," and delivering a copy to any ratepayer of the district to which such bye-laws relate, upon his application, pursuant to s. 116 of the Public Health Act, 1848. It is not, however, upon that ground that I decide this case. There is another and a more certain one for a decision in favour of the appellant. The second question put to us is whether such bye-laws are just and reasonable, and within the powers for that purpose given by the Public Health Acts, 1848 and 1858. I can only say that that depends upon what is the true construction to be put upon them. If I thought they could

(1) Law Rep. 10 Q. B. 152.

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fairly bear the construction put upon them by the respondents, I should hold them to be unreasonable and absurd. I hold them to be just and reasonable, because I think they do not involve a construction so unreasonable as would be required to include the present case. The word "building" primâ facie means every structure that could in any sense be called a building, even if erected for a mere temporary purpose. We must look at the whole language of the 36th bye-law to see if it could have been intended to use the word in so large a sense. Seeing the description which the justices give of the erections in question, it seems to me that it would be absurd to hold the second of them to be a building within that bye-law. It consisted of upright walls some two feet thick, in the form of a square, having an opening at either end, and measuring about twelve yards on each side. It has no residential quality; and the intention of the appellant was to turn it into a brick-kiln or clump. Can that be said to be a building to which any of these provisions as to detail plans and sections, &c., would apply? The mere reading of the bye-law shews that it could not. As to the other structure a more difficult question arises. It is described as a structure built with 9-inch walls, and containing two rooms, one of which had a fire-place and chimney. Then the statement goes on as to both,—The appellant had in contemplation the building of a number of cottages in the immediate neighbourhood of such structures; and the first-mentioned structure was for the storing of tools and general convenience of the workmen proposed to be employed in the erection of such cottages; the other being for the purpose of a brick-kiln. Both structures were intended to be pulled down by the appellant upon the completion of the cottages in question. It is not suggested that any one was to live there; and inferentially it is shewn that they are mere temporary structures. That being so, it seems to me that it would be absurd to hold these things to be buildings within the meaning of the bye-law, so as to be prohibited from being erected without notice and the sending in of detail plans and sections, and the other formalities referred to. I therefore think the justices were wrong in holding these structures to be buildings within the bye-laws relied on; and that, if they could be so held, the bye-laws would have been unreasonable. We are

bound to read them so as to make their provisions reasonable and consistent. The conviction must be quashed.

LINDLEY, J. I am of the same opinion. The question turns mainly upon the true construction of bye-law 36. I think these bye-laws are made under the Public Health Act, 1848, and not under the Towns Improvement Act, 1847, and therefore the objection as to the insufficiency of the publication falls to the ground. The serious question is as to the true construction and the reasonableness or unreasonableness of the bye-law referred to. Let us see the general drift of these bye-laws. The general heading is "Bye-laws made by the Rhyl Improvement Commissioners." The first division is, "with respect to the level, width, and construction of new streets, and the provision for the sewerage thereof:" and then come other headings,—"with respect to the structure of walls of new buildings, for securing stability and the prevention of fires," and so on: and then comes No. 36, which is under the heading, "As to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or construct buildings, as to inspection by the town surveyor," &c. The case in substance finds that the buildings in question were temporary only. After describing them, the justices find that the appellant had in contemplation the building of a number of cottages; and then they go on to say, "Both structures were intended to be pulled down upon the completion of the cottages." That being so, I cannot read the 36th bye-law as applicable to such structures. If I had come to the opposite conclusion, I should have thought the bye-law unreasonable and absurd. As applicable to buildings of a permanent character and to be used for the purpose of dwelling-houses, it is a perfectly reasonable bye-law. As to how far the commissioners have exceeded their authority, in delegating their powers in this respect to the town surveyor, I say nothing. It is enough to say, that, as applicable to structures such as described, it is not a reasonable bye-law. The conviction must therefore be quashed.

Conviction quashed.

Solicitors for appellant: *Williamson, Hill, & Co.*

Solicitors for respondents: *Finney & Bruff, for Louis & Edwards, Ruthin.*

1878
May 28.

ROBERTSON *v.* HOWARD.

Pleading—Specially Indorsed Writ, Order III., r. 6*—Notice in lieu of Claim; Order XXI., r.* 4*—Demurrer, Order XXVIII., r.* 1.

A writ specially indorsed (Order III., Rule 6), and notice delivered as a statement of claim (Order XXI., Rule 4), together form a "pleading" which may be demurrable (Order XXVIII., Rule 1.)

Such a "pleading" shewed the claim to be for breach of an alleged agreement which was apparently without consideration:—

Held, bad on demurrer.

WRIT specially indorsed thus: "The plaintiff's claim is 100*l.* amount of money, owing by the defendant to the plaintiff, upon an agreement or undertaking given by the defendant to the plaintiff on the 12th day of September, 1876.

The following are the particulars of the plaintiff's claim:—

1878. Feb. 25th. To amount owing upon an agreement or undertaking given by the defendant to the plaintiff on the 12th day of September, 1876 . . . . . 100*l.*

The following is a copy of such agreement or undertaking:—

"To Mr. Robertson. "Liverpool, Sept. 12th.

"Dear Sir,—I agree to give you the sum of one hundred pounds in the event of getting the contract for plumbing, painting, and glazing of hotel, banks, &c., to be built at New Brighton.

(Signed) "T. Howard."

The plaintiff gave notice under Order XXI., Rule 4, that the particulars of the plaintiff's complaint, and of the relief and remedy to which he claimed to be entitled, appeared by the indorsement upon the writ of summons.

Defence. Demurrer.

R. E. Turner, for the defendant. The writ being specially indorsed, it was "sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ:" Order XXI., Rule 4. The indorsement and notice are then equivalent to a statement of claim, but shew that the claim is founded on an alleged agreement without consideration, and therefore disclose no cause of action.

They together form a "pleading" to which the plaintiff may demur: Order XXVII., Rule 1, and are demurrable.

Channell, for the plaintiff. The agreement is not required by law to be in writing, and consideration for it can be proved at the trial. It would be difficult to state on the indorsement of a writ every fact forming the cause of action. The statement that the sum claimed is "money owing," suffices to prevent the demurrer. If this indorsement is defective some of the Judicature Act Forms, App. A., Pt. ii., Sect. vii., must be so likewise, ex. gr., Form 4, for an action against the acceptor and drawer of a bill of exchange, contains no allegation of presentment and dishonour. The Court may order the plaintiff to deliver a further statement: Order XXI., Rule 4. But as there is "only a frivolous ground of demurrer stated the Court may set aside such demurrer with costs:" Order XXVIII., Rule 1, and should do so.

LINDLEY, J. I think that a specially indorsed writ, coupled with notice under Order XXI., Rule 4, is to be treated as a statement of claim for all purposes, and may be demurred to. It is a "pleading" within the meaning of Order XXVIII., Rule 1. That no consideration appears for the alleged agreement in the indorsement of this writ is almost conceded, and the general allegation of "money owing" is not sufficient to exclude the demurrer on the ground that the facts alleged do not shew any cause of action. Therefore, I think the demurrer must be upheld. But the plaintiff may have liberty to deliver a statement of claim in which perhaps he may be able to set out consideration. The costs should abide the event of the action. If no consideration can be alleged the defendant should have the benefit of success on the demurrer, but not so if consideration can be alleged.

Demurrer allowed. Costs to be costs in the cause. Liberty to the plaintiff to deliver a statement of claim within a week, and liberty to the defendant to plead thereto.

Solicitors for plaintiff: *Milne, Riddle, & Mellor.*
Solicitors for defendant: *J. & R. Gole.*

1877
Nov. 27.

[IN THE COURT OF APPEAL.]

STONE *v.* THE CITY AND COUNTY BANK, LIMITED.
COLLINS *v.* THE CITY AND COUNTY BANK, LIMITED.

Company—Action to recover back Money paid for Shares, on the ground of Fraud—Voluntary winding up—Companies Acts, 1862 *and* 1867*—Construction of Agreement—Calls—Notice of Call.*

The principle of *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) extends to the voluntary winding up of a company formed under the Companies Acts, 1862 and 1867. Where, therefore, a company, its assets being insufficient to meet its liabilities, is voluntarily wound up, a shareholder in such company, who has been induced to take shares by the fraudulent representation of its directors, cannot repudiate his shares, nor seek to rescind a contract in respect of them, nor can he recover back from the company money paid by him for the shares.

The notice to the shareholders convening the meeting at which an extraordinary resolution was passed to wind up a bank voluntarily and appoint a liquidator (in which was embodied an agreement by the directors with B. & Co., a London banking firm, to transfer to the latter all the assets of the bank upon their undertaking the debts and liabilities of the bank, not including any claims of shareholders to have money repaid to them on the ground of fraud), was in the words of s. 129, clause 3, of the Companies Act, 1862 :—

Held, by Lindley, J., that the notice was sufficient and the resolution binding on all the shareholders of the bank (under s. 136), whether they were present and voted for it or not.

By the agreement referred to in the above resolution it was provided, amongst other things, that B. & Co. should pay all the debts and liabilities of the bank, and should indemnify the bank and the shareholders against the same; that the whole assets of the bank, "including under such term the uncalled capital and any arrears of calls already made," should be transferred by the bank to B. & Co., who should be empowered to collect and get in all the said assets of the bank; and that the bank should admit B. & Co. as creditors against the bank in respect of all payments made by them to or on behalf of the bank :—

Held, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the effect of this arrangement was to keep alive the debts and liabilities as against the bank, and in favour of B. & Co., to the extent necessary to entitle the latter to recoup themselves, in respect of their payments, out of the assets of the bank, including its uncalled capital.

By the articles of association of the bank every shareholder was required to pay calls to the person and at the time and place appointed by the directors; and twenty-one days' notice was to be given of the time and place appointed. By a resolution of the directors before a voluntary winding up, they made a call payable by instalments at certain dates, but no place or person at which or to whom the call was to be paid was mentioned, and no notice of the call was given by the directors; after the winding up the liquidator gave notice to the shareholders

that a call had been made, and requested them to pay it to certain persons at a specified place and time:—

Held, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the liquidator had power to enforce the call made by the directors, and that the notice given by him was sufficient under the Companies Act, 1862, s. 95, clauses 4 and 8, and s. 133, clauses 5 and 7.

STONE *v.* THE CITY AND COUNTY BANK.

SPECIAL CASE stated under an order of this Division.

Action to recover back 500*l.*, which the plaintiff paid for certain shares in the defendants' company. The defendants by way of counter-claim demanded of the plaintiff, as shareholder in the defendants' company, 200*l.* in respect of calls on the shares.

2. The defendants were a company incorporated under the Companies Acts, 1862 and 1867 (25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131), limited by shares, with a capital of 500,000*l.* divided into 100,000 shares of 5*l.* each, and carried on business in London, and certain persons carrying on business as bankers in Leeds under the style of Williams, Brown, & Co., and in London under the style of Brown, Janson, & Co., purchased the assets and undertook to pay all the debts proved or to be proved against the defendants' company under the circumstances hereinafter more particularly mentioned. The London firm of Brown, Janson, & Co., were the clearing bankers of the defendants' company.

3. The defendants, about Midsummer, 1874, issued a prospectus describing their bank as in active and successful operation, and stating that the business already done had enabled the directors to declare dividends commencing December, 1872, at the rate of 5 per cent. per annum, and gradually increasing to 7 per cent. for the twelve months ending the 30th of June, 1874. The prospectus also described the business as profitable.

4. The defendants also issued a report and balance-sheet for the half-year ending June 30th, 1874. From this report and balance-sheet it appeared that the defendants had in the said half-year made sufficiently large profits to enable them to declare a dividend at the rate of 7 per cent. per annum for the half-year. This balance-sheet misrepresented the amount of the cash in hand at the defendants' bankers in the manner hereinafter fully described, and also treated a considerable amount of bad debts due to the

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defendants' company as being good and valuable assets of the defendants' company.

5. The plaintiff received from the defendants a copy of the prospectus in August, 1874, and also the report and balance-sheet before mentioned, and was induced by the statements contained in the prospectus, report, and balance-sheet, to apply to the defendants on or about the 2nd of September, 1874, for 200 shares in the capital of the defendants' company, and paid to the defendants in respect thereof the sum of 500*l.*, and the defendants allotted to the plaintiff 200 shares accordingly. But for the misrepresentation as to the amount of the cash in hand at the bankers, the plaintiff would not have applied for the shares.

6. The statements contained in the prospectus as to the bank being in active and successful operation, and as to the business already done enabling the directors to declare dividends at the rates therein stated, and also as to the profitable nature of the business of the company, were false to the knowledge of the directors. The balance-sheet also, as the directors well knew, did not truly represent the financial position of the defendants, the company not being in truth and in fact entitled to place on the credit side of their balance-sheet the amount that therein appeared.

7. The defendants issued and published the prospectus, report, and balance-sheet so received by the plaintiff for the purpose of inducing the plaintiff and others to take shares in the company, and did induce the plaintiff and others to take shares on the faith of the same.

8. On the 16th of July, 1875, the resolution hereinafter set out for the voluntary winding-up of the defendants' company was passed, and in November, 1875, a criminal charge was made and heard at the Mansion House, London, against the directors of the defendants' company for the frauds hereinbefore mentioned; and the plaintiff then first became aware of the said frauds. The investigation of the charge was continued into the month of December, 1875, and on the 14th of January, 1876, and (as a matter of fact apart from all questions of law arising upon the other facts herein stated) within a reasonable time after the false and fraudulent nature of the prospectus, report, and balance-sheet

had come to his knowledge, the plaintiff repudiated the shares allotted to him.

9. The plaintiff claims in this action to be repaid by the defendants the sum of 500*l.* so paid by him, together with interest at 5*l.* per cent. per annum from the date of the allotment.

10. The defendants at the time they commenced the business of bankers in London had no sufficient subscribed capital of their own wherewith to carry on such business, but assistance was afforded by Brown, Janson, & Co., to whom the defendants were always indebted in a large amount.

11. At the close of each day after the 28th of October, 1873, the current account of the defendants with Brown, Janson, & Co. was overdrawn (except on the special occasions referred to in paragraphs 14 and 15), so that the defendants were entirely dependent upon Brown, Janson, & Co., who thenceforth had it in their power at any time to put an immediate stop to the business of the defendants by refusing to honour their cheques. Such power was in fact exercised by Brown, Janson, & Co., on the 15th of May, 1875.

12. It is the almost universal custom with bankers to balance their books as of the 30th of June and 31st of December in every year; and the defendants balanced their books at those dates; and it was also the custom of the defendants to print and publish a balance-sheet, which purported to shew their financial position at the close of such half-yearly periods, in order to induce the public to apply to them for allotments of their unsubscribed capital.

13. Many of such applications were made through Brown, Janson, & Co., who received the moneys payable in respect of such applications and also the moneys payable on and after allotment; and they credited the defendants with such moneys when received. Such applications were in fact numerous and continued down to the time of the suspension of the defendants hereinafter mentioned.

14. On the afternoon of the 30th of June, 1874, one of the London partners of Brown, Janson, & Co., at the request of one of the officers of the defendants' company, entered to the credit of the defendants' current account the sum of 15,000*l.* by way of a loan, and the defendants' pass-book was balanced as of the close of that day, by making it appear that the defendants had to the credit of their banking account the sum of 12,175*l.* 18*s.* 1*d.* This sum of

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15,000*l.* was entered in the books of Brown, Janson, & Co. as a loan by them to the defendants; but the understanding between the defendants and the London partner in the firm of Brown, Janson, & Co. was, that such loan was to be written off on the following morning, and was not to be drawn upon by the defendants. On the morning of the 1st of July, 1874, the sum of 15,000*l.* was accordingly entered to the debit of the current account, with one day's interest, and appeared in the pass-book as the first debit entry of that day, and was credited to the loan account, whereupon the account-current of the defendants' company with Brown, Janson, & Co. shewed an overdraft of 2824*l.* 1*s.* 11*d.* according to the true state of the account, instead of the apparent credit balance of 12,175*l.* 18*s.* 1*d.*

15. An operation precisely similar in every respect had been gone through at the close of the previous half-year with the sum of 5000*l.*, and at the close of the half-year previous to that with the sum of 1500*l.*, and on no other occasion.

16. The defendants' purpose with regard to such entries was, to conceal from their shareholders and the public the fact of their current-account with their bankers being overdrawn, and the absence of cash reserves available for carrying on business; and they so used the same in the balance-sheet hereinbefore referred to.

18. On or about the 11th of February, 1875, the defendants paid to the plaintiff one half-year's dividend on his shares at the rate of 7 per cent. per annum.

19. On the 18th of May, 1875, the defendants stopped payment, and Brown, Janson, & Co. presented a petition to the Court of Chancery that the defendants' company might be wound up compulsorily under the direction of the Court. On the same day several other petitions for the compulsory winding up of the defendants' company were presented by shareholders and creditors respectively, including one by a shareholder of the company named Hird. On the 22nd of May, 1875, Mr. Hart was, on the petition of Hird, appointed provisional liquidator of the company. Brown, Janson, & Co. took out a summons to discharge the order appointing Hart provisional liquidator, which summons was dismissed on the 25th of May, 1875. On the 27th of May, 1875, a document of that

date was drawn up and executed by Brown, Janson, & Co. and the directors of the defendants' company, whereby it was provided that the whole assets of the bank, including the uncalled capital, should be forthwith transferred to Brown, Janson, & Co., and that Brown, Janson, & Co. should pay all the debts and liabilities of the bank as stated in the schedule to the document, and should indemnify the bank and every shareholder thereof against the same.

20. On the 28th of May, 1875, an order was made upon the petition of Hird for the compulsory winding up of the company.

21. Brown, Janson, & Co. appealed against the order of the 28th of May, 1875; and on the 28th of June, upon the hearing of the appeal, the Lords Justices of Appeal discharged the order, with liberty to the defendants' company to call a meeting of the shareholders of the defendants' company for the purpose of considering the agreement of the 27th of May proposed as aforesaid by Brown, Janson, & Co.: and on the 16th of July, 1875, at an extraordinary general meeting of the shareholders of the defendants' company, of which due notice specifying the intention to propose thereat such resolutions had been given, the following extraordinary resolutions were passed:—

1. That it has been proved to the satisfaction of the shareholders that the bank cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

2. That the bank be wound up voluntarily under the provisions of the Companies Acts, 1862 and 1867.

3. That Mr. S. L. Price be appointed liquidator for the purpose of winding up the affairs of the bank.

4. That the agreement dated the 27th of May, 1875, and made between the City and County Bank, Limited, and W. Jones and others, directors of the bank, of the one part, and S. J. Brown and others, trading under the style or firm of Brown, Janson, & Co, of the other part, being an agreement for the payment by them of the debts and liabilities of the bank, and for the transfer to Messrs. Brown, Janson, & Co. of the assets of the bank, be and the same is hereby confirmed, and declared to be binding on the bank.

5. That Mr. S. L. Price, as such liquidator as aforesaid, be requested, authorized, and empowered to carry out and complete the same forthwith.

The plaintiff by his proxy voted at the meeting in favour of the resolutions.

22. On the 23rd of July, 1875, the matter came again before the Lords Justices of Appeal, and a discussion took place with

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respect to the document of the 27th of May, 1875; and it was suggested that there might be other debts and liabilities of the defendants' company, of the same kind and description as those enumerated in the schedule, which were not included in the schedule; and thereupon Brown, Janson, & Co., by their counsel, submitting to the jurisdiction of the Court, undertook to pay all the debts proved or which should be proved against the City and County Bank, Limited, whether scheduled to the agreement of the 27th of May or not. In giving this undertaking, the counsel for all parties were treating and agreeing with reference only to debts and liabilities of the kind appearing in the schedule to the document, and not with reference to any claims by the shareholders themselves to have money repaid to them on the ground of fraud.

24. Brown, Janson, & Co., on the 23rd of July, 1875, had, and ever since had, ample means of their own to pay all creditors of the defendants' company, and had in fact paid all the creditors claiming in respect of debts of the kind and description scheduled to the document. They had not paid any of the claims by the shareholders themselves claiming from the defendants' company a return of moneys paid by them to the defendants in respect of shares, which they were induced to take by the fraud of the defendants. At the time of the stoppage of the defendants' company the debt due from them to Brown, Janson, & Co. amounted to 45,000*l.* or thereabouts; and the assets of the defendants' company were insufficient to satisfy the debts of the defendants (apart from the debt due to Brown, Janson, & Co., and apart from claims by shareholders for the return of moneys paid in respect of shares); and Brown, Janson, & Co. will ultimately be out of pocket to a considerable amount by reason of the undertaking given by them as in the 22nd paragraph of this case mentioned.

25. By the memorandum and articles of association of the defendants' company it was provided that every shareholder should be liable to pay the amount of every call to the person and at the time and place appointed by the board, and twenty-one days' notice should be given of the time and place appointed by the board for the payment of every call. On the 18th of May, 1875, it was resolved by the board of directors of the company that a call of 1*l.* per share be and was thereby made, such call to become due and

be payable as follows,—10*s.* on the 21st of June, and 10s. on the 21st of July then next, and that such call be hypothecated to Brown, Janson, & Co. No place or person, at which or to whom the said call was to be paid, was mentioned in the resolution. No notice of the call was ever given by the directors of the defendants' company: but, on the 26th of August, 1875, S. L. Price, the liquidator of the defendants' company, who had been so appointed as aforesaid, gave notice to the shareholders of the said call, and requested them to pay the same to Brown, Janson, & Co., 32 Abchurch Lane, London, on or before Saturday the 18th of September then next. The last-mentioned notice was received by the plaintiff on the 27th or 28th of September, 1875, upon his return from abroad; but he did not pay the call or any part thereof.

26. On the 12th of September, 1875, the plaintiff was settled on the list of contributories of the defendants' company at a meeting convened for that purpose, of which he had received notice.

27. Before the plaintiff repudiated his shares, as in paragraph 8 mentioned, Brown, Janson, & Co. had acted upon the agreement and undertaking in paragraph 22 mentioned, and had paid certain of the debts of the company.

The questions for the opinion of the Court were,—1. Was the plaintiff under the circumstances hereinbefore set forth entitled to recover against the defendants the said 500*l.* and interest?—2. Were the defendants entitled to recover against the plaintiff the said 200*l.* and interest?

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Declaration for money received by the defendants for the use of the plaintiff, and for interest. Claim, 50*l.* By the particulars the plaintiff claimed two several sums of 20*l.* and 10*l.*

Pleas,—1. Never indebted, except as to 30*l.*,—2. As to 30*l.*, for defence on equitable grounds, that the defendants are a company limited by shares registered and incorporated under the Companies Acts, 1862 and 1867, with a capital of 500,000*l.* divided into 100,000 shares of 5*l.* each, and that the directors of the company issued and published a prospectus, report, and balance-sheet containing certain false and fraudulent misrepresentations and statements as to the company and its financial position, with

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intent to induce, and by the said misrepresentations and statements induced (amongst others) the plaintiff to become a member of the company and the holder of twenty shares of the company, and to pay to the company 30*l.* upon and in respect thereof: that afterwards, while the plaintiff and others were members of the company and the holders of shares of the company, and before the plaintiff disaffirmed his rights or liabilities as a member of the company and the holder of the shares, or repudiated the shares or any of them, the company duly passed an extraordinary resolution within the meaning of the Companies Act, 1862, to the effect that it had been proved to their satisfaction that the company could not by reason of its liabilities continue its business, and that it was advisable to wind up the same, and that the company be wound up voluntarily under the provisions of the Companies Acts, 1862 and 1867, and a liquidator was duly appointed to wind up the affairs of the company: that the assets of the company were and are insufficient for payment of the debts and liabilities of the company and the costs of the winding-up, by an amount exceeding the sum of all the amounts remaining unpaid upon all the shares of the company held by the members thereof; and that, before the plaintiff disaffirmed his rights and liabilities or repudiated his shares or any of them, creditors of the company and other persons having claims against the company acquired rights and interests disentitling the plaintiff to disaffirm his rights and liabilities or to repudiate the shares; and that the plaintiff is a contributory of the company and liable to contribute to the assets of the company, required for payment of the debts and liabilities of the company and the costs of the winding up, to the extent of the amount unpaid up on his shares: and that the plaintiffs' claim herein pleaded to is a claim to recover back the 30*l.* so paid by him to the company as aforesaid, on the ground that he was induced to become a member of the company and the holder of the shares, and to pay the 30*l.*, by the fraudulent misrepresentations and statements contained in the prospectus, report, and balance-sheet, and not otherwise.

Second replication on equitable grounds,—that the said extraordinary resolution included a resolution in the words and figures following: [The replication set out the 4th resolution mentioned

in paragraph 21 and averred] that by the agreement of May 27, Brown, Janson, & Co. agreed to take over all the assets of the defendants' company; and in consideration thereof to pay all the liabilities of the defendants' company included in a schedule to the agreement annexed; and afterwards, on the hearing of an appeal before the Lords Justices of Appeal against certain orders made in the Court of Chancery in the matter of a petition for the compulsory winding-up of the defendants' company, Brown, Janson, & Co., who were represented by counsel on the hearing of the appeal, undertook to pay, not only all the liabilities of the defendants' company included in the schedule to the agreement, but also all the liabilities of the defendants' company whether included in the schedule or not; that the undertaking of Brown, Janson, & Co. was made through their counsel on the hearing of the appeal, and was embodied in the order made by the Lords Justices of Appeal disposing of the appeal; and the whole of the beneficial interest in the assets of the defendants' company vested in Brown, Janson, & Co. in pursuance of the agreement and undertaking; and that Brown, Janson, & Co. have sufficient assets to pay the whole of the liabilities of the defendants' company in full, with all interest; and that this action is being defended for the sole benefit of Brown, Janson, & Co., who have undertaken to pay all the liabilities of the defendants' company, and in whom all the assets of the company have vested: and that Brown, Janson, & Co. were privy to the false and fraudulent representations and statements made by the directors at the time of the meeting thereof and before the agreement of May 27, 1875, as amended by the said undertaking, became binding on Brown, Janson, & Co., and before the plaintiff was induced to become a holder of the said shares in the company and to pay the 30*l.*, of which sum Brown, Janson, & Co. have the benefit, not only as assignees of the assets of the company, but as creditors of the company.

The second rejoinder to the second replication set out the agreement of the 27th of May, 1875, of which the material parts are:—

3. If Price, Waterhouse, & Co., shall on or before the 29th day of May, 1875, report to Brown, Janson, & Co., that the statement of liabilities in the schedule

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is correct, then Brown, Janson, & Co. shall pay all the debts and liabilities of the bank as stated in the schedule, and shall indemnify the bank and every shareholder thereof against the same.

4. The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any goodwill or alleged goodwill of the bank, which is retained by the bank, shall be forthwith transferred by the bank to Brown, Janson, & Co., who shall be empowered in such manner as Brown, Janson, & Co. shall direct, to collect and get in all the assets, and the bank and the directors thereof shall execute all such instruments and do all such things as Brown, Janson, & Co., shall require, for the purpose of giving effect to the aforesaid transfer. The bank and the directors thereof shall on request deliver to Brown, Janson, & Co., or such person as they shall in writing appoint, all the books, papers, and securities of the bank.

5. The bank shall admit Brown, Janson, & Co. as creditors against the bank in respect of all payments made by Brown, Janson, & Co., to or on behalf of the bank.

6. If after payment to Brown, Janson, & Co. of all moneys paid by them for or in respect of the debts and liabilities of the bank, with interest at 4*l.* per cent. on such moneys, from the date of the payment thereof, and the payment of all costs of and attending and preliminary to these presents and of realising the assets, and ascertaining the debts and liabilities, and the petitions for winding up the bank and consequent thereon and in connection therewith, there shall remain any surplus of the assets of the bank, Brown, Janson, & Co. shall pay such surplus to the liquidator.

The rejoinder then set out the order of Lords Justices embodying the undertaking of Brown, Janson, & Co., mentioned in paragraph 22 in the second replication, and concluded as follows: that the plaintiff's claim in respect of the matters in the second plea pleaded to is not a debt or liability included in the schedule to the agreement, and is not a debt within the meaning of the said undertaking; and that Brown, Janson, & Co. have not sufficient assets of the defendants' company to pay the whole of the liabilities of the defendant company in full, and all interest; and that this action is not being defended for the sole benefit of Brown, Janson, & Co.; and that Brown, Janson, & Co. were not privy to the false and fraudulent representations and statements, as alleged.

Issue thereon.

The case of *Collins* v. *The City and County Bank,* which was tried before Lindley, J., without a jury, was argued before the learned judge upon further consideration, together with the special case of *Stone* v. *The City and County Bank,* by consent.

C. Russell, Q.C., and *R. V. Williams,* for the plaintiffs.

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Wood Hill (*Thesiger, Q.C.*, and *Cohen, Q.C.*, with him), for the defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 27. Judgment was delivered by

LINDLEY, J. In these two cases of *Stone* v. *The City and County Bank* and *Collins* v. *The City and County Bank* I do not think it necessary to refer at any length to the facts, which are really not in dispute.

The plaintiffs in these actions seek to recover from the defendants' company the moneys they paid to the company in respect of shares in the company allotted to them; and the ground of action is in both cases the same, viz., that the plaintiffs were induced by the fraud of the company to apply for and take the shares allotted to them. The fact, that the plaintiffs were induced by fraud on the part of the company to take the shares, is admitted by the pleadings in Collins's action, and is found in the special case in Stone's action; and I therefore assume this point in favour of both plaintiffs. It is further found in one action, and admitted in the other, that the plaintiffs repudiated their shares before action and in a reasonable time after they discovered the fraud. Under these circumstances, if the company were not being wound up as hereinafter mentioned, the plaintiffs would be entitled to succeed. But, before these actions were brought, and before the plaintiffs repudiated their shares, and before in fact they discovered the fraud entitling them to repudiate their shares, a resolution was passed for winding the company up voluntarily, under the provisions of the Companies Act, 1862; and it is admitted in the one action and found in the other that at the time of the commencement of the winding up the assets of the company, including its uncalled capital, were not sufficient to pay its undisputed debts and liabilities.

Now, assuming that the resolution to wind up was valid, and that the company was really being wound up under it, I am of opinion that this winding up and state of the assets are fatal to the plaintiffs, and afford a complete defence to both actions. My

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reasons for this opinion are that the plaintiffs are not suing the company for unliquidated damages for the frauds of which they complain. I have looked at the pleadings, and I am satisfied that they do not admit of any such claim: and it is far too late now to treat the pleadings as amended, so as to raise an action of that kind.

The plaintiffs are seeking to recover what they paid for their shares. Their claims are based on the theory that they are no longer shareholders,—on the theory, namely, that, notwithstanding the winding up and the state of the assets to which I have alluded, they had a right to rescind, and had rescinded their contracts before the commencement of their actions. But if the plaintiffs had no right to rescind their contracts, their actions were not sustainable.

Now, it appears to me that *Oakes* v. *Turquand* (1) shews conclusively that the plaintiffs had no such right. It was contended by the plaintiffs that for several reasons this decision did not apply to the present cases. First, it was said that it does not appear that any of the debts of the company were contracted on the faith of the plaintiffs being members of it, and that the decision in *Oakes* v. *Turquand* (1) was based on what Lord Campbell said on the subject of estoppel in *Henderson* v. *Royal British Bank.* (2) But, in the first place, it did not appear in that case that Henderson trusted the Royal British Bank by reason of Goddard being a shareholder in it; nor was there any evidence in *Oakes* v. *Turquand* (1) that any creditors in particular had trusted Overend, Gurney, & Co., Limited, by reason of Oakes being a shareholder therein. The observations in both these cases on the subject of estoppel are of a general nature, and, as I understand them, are applicable to all registered companies whose registers of shareholders are open to inspection, without reference to the question whether any particular member has more or less induced credit to be given by any particular creditor. But it further appears to me that *Oakes* v. *Turquand* (1) decides at least the general proposition that a person induced by fraud to take shares in a company, formed and registered under the Companies Act, 1862, cannot repudiate those shares after the company has been

(1) Law Rep. 2 H. L. 325. (2) 7 E. & B. 356; 26 L. J. (Q.B.) 112.

ordered to be wound up by the Court, or subject to its supervision, if at the time of repudiation there are any debts of the company unpaid.

Then, it is contended that *Oakes* v. *Turquand* (1) does not apply, as the winding up of the defendants' company is purely voluntary: and in support of this proposition the differences between a voluntary winding up and the other modes of winding up were minutely examined; the omission of the word "creditors" from s. 138, and the remedy given to creditors by s. 145, were dwelt upon; and the observations of the present Master of the Rolls in *Re Poole Fire Brick Co.* (2), and the decision of Bacon, V.C., in *Hall* v. *Old Talargoch Lead Mining Co.* (3), were relied on. But it appears to me impossible to hold that the right of members to rescind their contracts with the company can depend on whether the company is being wound up in one way rather than in another. The object of all modes of winding up is, to insure an equal division of the company's assets, first, amongst all its creditors, and then amongst all its members according to their rights inter se; and ss. 131, 132, 133, 138, and 158, which I do not stop to read, shew conclusively to my mind that, although the remedies open to creditors are somewhat different in the case of a voluntary winding-up from what they are in other cases, yet their rights, as distinguished from their remedies, are in no respect different, unless it be as regards the time when interest on their debts ceases to run. No case, I believe, exists which is inconsistent with this view. In *Hall* v. *Old Talargoch Lead Mining Co.* (3) the plaintiff had repudiated his shares before the commencement of the winding up, which accounts for Vice-Chancellor Bacon's remark that "no relief is asked against the company beyond what the law allows, or which is inconsistent with the Winding-up Acts,"—an observation which the facts of the cases before me render inapplicable to them. In a voluntary winding up, protection is afforded to creditors by allowing them to bring actions without the leave of the Chancery Division, and to apply for a compulsory order to wind up, or for a supervision order: but the obligations of the company and of its members, whether statutory or other-

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 17 Eq. 268.
(3) 3 Ch. D. 749.

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wise, do not depend upon or vary with the manner in which the winding-up is conducted. In all cases all the assets are distributable pari passu amongst all the creditors, and the assets include uncalled capital.

Next, it is contended that the defendants' company was not in fact being wound up voluntarily under the Companies Act, 1862; and if this could be established, I should agree that *Oakes* v. *Turquand* (1) did not apply. It becomes necessary, therefore, to investigate this contention.

First, it was suggested that Collins could not be bound by the resolution to wind up, as he had not received any notice convening the meeting at which the resolution was passed. But this point was disposed of by proof, that notice was sent to him by post to his address as entered in the register of members. Secondly, it was suggested that the notice convening the meeting was invalid, because it was so framed as to lead those to whom it was addressed to conclude that whatever might be resolved upon at that meeting would be subject to confirmation at a subsequent meeting; and in support of this objection reliance was placed on the case of *In re Bridport Old Brewery Co.* (2) But in this case the notice was in the very words of s. 129, clause 3, of the Companies Act, 1862; and no person, aware of the difference between a special resolution and an extraordinary resolution as defined by the Act, could be misled by the notice; and persons not aware of the difference cannot derive any advantage from their ignorance in this respect. Thirdly, it was contended that, even if the resolution to wind up was valid, the company was not being wound up under it, but under a special agreement inconsistent with a liquidation under the Act. This agreement, however, was one which was in fact sanctioned by an extraordinary meeting of shareholders duly convened for the purpose of sanctioning it (I looked particularly at the notice to see that, and found it was so), and was and is in my opinion binding on all who were members of the company when so sanctioned, whether they voted for it, as Stone did, or whether they did not, as was the case with Collins: see s. 136. Whether the arrangement was binding on the creditors of the company, depends upon the proportion of creditors who acceded

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 2 Ch. 191.

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to it: but, as no person, who was a creditor when the arrangement was made, has ever questioned it, this point need not be further considered. It is impossible to treat the plaintiffs as creditors of the company, when the arrangement was made, for the sums they seek to recover in these actions; for they had not then repudiated their shares, even if they had a right to do so, which I think they had not after the resolution to wind up had passed.

But then it is said that all the creditors of the company except Brown, Janson, & Co., have been paid, and that Brown, Janson, & Co. are disentitled, by the part they took in assisting the company in its fraud, from standing as creditors as against the plaintiffs. To this, however, the short answer is, that the debts of the company other than that due to Brown, Janson, & Co., were not paid before the commencement of these actions; and that, even if they had been, the true effect of the arrangement under which those debts were paid was, to keep alive those debts as against the company and in favour of Brown, Janson, & Co. to the extent necessary to entitle them to recoup themselves in respect of their payments, out of the assets of the company, including its uncalled capital. That this is the true effect of the agreement I think is plain, notwithstanding the last words of clause 3, by which the company and its shareholders are indemnified against such debts.

With reference to that, I will just turn to the agreement itself, which is set out in Collins's case. The material parts of this agreement are the third, fourth, fifth, and sixth clauses. Now, the third clause says that Brown, Janson, & Co., shall pay all the debts and liabilities of the bank as stated in the schedule, and shall indemnify the bank and the shareholders against the same. If the agreement had stopped there, one would have supposed that no call could be made upon the shareholders even for the payment of these debts or to recoup Brown, Janson, & Co., for what they might pay in respect of them. But that construction is obviously inconsistent with the next clause of the agreement, which goes on to say, "The whole assets of the bank, including under such term the uncalled capital and any arrears of calls already made, but exclusive of any goodwill," and so on, "shall be forthwith transferred by the bank to Messrs. Brown, Janson, & Co., who shall be

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empowered, in such manner as Messrs. Brown, Janson, & Co., shall direct, to collect and get in all the said assets of the bank." Then there is the next clause, the fifth, which also shews that that indemnity at the end of clause 3 cannot be carried to this extent, that Brown, Janson, & Co., were to pay these debts and forego their right to call up the uncalled capital of the company; because clause 5 is, "The bank shall admit Brown, Janson, & Co. as creditors against the bank in respect of all payments made by Brown, Janson, & Co., to or on behalf of the bank." I think it is quite plain, therefore, reading those clauses together and taking them as a whole, that, whatever doubt may be thrown upon the question by the concluding words of clause 3, the real meaning and effect of this agreement is this, that Brown, Janson, & Co., are to pay the debts, but they are to have, in order to recoup themselves, or to enable them to pay themselves, the assets of the bank, including all uncalled capital and they are to retain the right of insisting upon payment of the calls through the liquidator, notwithstanding the words of indemnity at the end of clause 3. I have no doubt myself that is the true construction.

For the reasons I have given, therefore, I am of opinion that the agreement with Brown, Janson, & Co., does not confer upon the plaintiffs a better right to maintain these actions than they would have had if no such agreement had been made. The agreement, however, does I think place an additional difficulty in the plaintiffs' way; for they cannot derive any benefit from the fact that the debts of the company have been paid by Brown, Janson, & Co., and repudiate their right to have the unpaid capital of the company called up to recoup them in respect of their payments to the other creditors of the company. The circumstance, that at the commencement of the winding up the assets of the company were insufficient to pay its debts, even excluding the 45,000*l.* due to Brown, Janson, & Co., renders it unnecessary to consider whether their rights as creditors would prevent the plaintiffs from recovering in these actions, regard being had to the alleged complicity of Brown, Janson, & Co., in the frauds on which the plaintiffs rely. The same circumstance also renders it unnecessary to determine the important question raised by Mr. Wood Hill upon the wording of the 131st section, viz., whether it is possible for

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any shareholder under any circumstances to repudiate his shares after a resolution to wind up has been passed. A repudiation of shares necessarily involves an alteration in the status of the repudiating shareholder; and the rights of the contributories amongst themselves can be adjusted without any such alteration; nor do I at present see how the language of that section is to be got over; but it may be that the words relied upon are only important for the protection of creditors. However, for the reason I have given, it is unnecessary to pursue this inquiry further on the present occasion. Nor, in the view which I take of this case, is it necessary for me to put any construction on the undertaking given by Brown, Janson, & Co., and embodied in the order of the Lords Justices. Whatever may be the meaning of the word "debts" in that undertaking, it gives the plaintiffs no right of action against the company which they would not have had without it; and, if the plaintiffs rely on the undertaking, they cannot repudiate their liability to pay up their shares in full.

It was strongly urged that, if these actions could not be sustained, the plaintiffs would be wholly without a remedy for the fraud from which they have suffered. But the answer to this is that they can bring actions for damages against those who defrauded them, and against the company itself, if the frauds of which they complain were in point of law imputable to the company, which on the materials before me I take to have been the case.

It only remains to consider the counter-claim of the company in Stone's action. A call was made in May, 1875, before the commencement of the winding up, by the directors, payable in June and July; but no notice was given by them of this call. After the winding up, viz. on the 26th of August, 1875, the liquidator gave notice to the shareholders of the call, and required payment of it. I am of opinion that he had power to do this under s. 133, clauses 5 and 7, and s. 95, clauses 4 and 8. No reason was given, and no authority was cited, to shew the contrary: and the only doubt I had in my own mind was, whether, considering the time which had elapsed from the making of the call, the directors themselves could in August have enforced payment of it on their giving notice of it. I however think they could. The point is only material

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as regards costs and interest; as, even if this call is not payable, a fresh call can be made in the winding-up. The argument that the claim for calls was really the claim of Brown, Janson, & Co., and that they cannot sustain such claim, is met by the agreement with them. The plaintiffs cannot avail themselves of this agreement, even for the purpose of maintaining this argument, without paying up their shares to the extent I have before referred to.

Upon all points, therefore, I am in favour of the defendants' company on both actions, and I pronounce judgment for the company accordingly, with costs.

[The learned judge refused leave to the plaintiffs to amend the proceedings by inserting claims to recover damages for fraudulent representations.]

In Collins's Case, Judgment for the defendants.
In Stone's Case, Judgment for the defendants upon the claim and counter-claim

The plaintiff in each action appealed.

Nov. 24, 26, 27. *Charles Russell, Q.C.*, for the plaintiff in each action. The question to be determined is, whether a person, who has been induced by fraud to become a member of a company, is entitled to maintain an action for damages after a resolution has been passed to wind it up voluntarily, and when its liabilities exceed its assets.

[*Cohen, Q.C.*, for the defendants, intimated that in his view the only question to be decided was, whether the plaintiffs could recover back the money which they had paid for their shares, and could resist the payment of further calls.]

It is submitted that any amendment ought to be made which would enable the plaintiffs to maintain their action; for they have been damnified by the defendants' fraud, and the real question is whether their remedies are barred by the voluntary winding up. Moreover the plaintiffs are entitled to sue in order to establish that their claims are within the terms of the agreement of the 27th of May, 1875, by Brown, Janson, & Co., the scope of which was enlarged by the proceedings before the Lords Justices

upon the 23rd of July, 1875. The Court ought to assist a bonâ fide claim for relief: Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7; Rules of the Supreme Court, Order XXVII., Rule 1; and in this case the plaintiffs ought to have the judgment of the Court upon the matter really in dispute.

As to the question arising upon the merits, if the company were solvent the plaintiffs would undoubtedly be entitled to maintain actions against the company for the fraud of the directors: Lindley on Partnership, book 2, ch. 1, s. 4, p. 333, 3rd ed. Clear authority for this contention is to be found also in *Barwick* v. *English Joint Stock Bank* (1) and in *Swift* v. *Winterbotham* (2); the decision in the latter case as to the liability of the principal was overruled in the Exchequer Chamber: *Swift* v. *Jewsbury* (3); but the judgment of that Court proceeded upon a ground immaterial to the purposes of the present argument. These authorities were commented upon in *Mackay* v. *Commercial Bank of New Brunswick* (4); and the decision in the *Western Bank of Scotland* v. *Addie* (5), which may at first sight seem to contain dicta against the contention for the plaintiffs, is there distinguished. A principal is liable wherever he has received a benefit by his agent's fraud; and the defendants in these actions by the misrepresentation of their directors have obtained from the plaintiffs the money sought to be recovered.

It is submitted that the right to sue the company, for the fraud of the directors, is not destroyed by their insolvency and by the voluntary winding up; possibly the plaintiffs may be liable to contribute to the assets and to pay further calls, and if they obtain judgments in these actions they may not be able to enforce them until all the creditors shall have been satisfied; but they have vested rights of action which can be taken away only by the provisions of some statute, and no statute deprives a defrauded shareholder of the means of obtaining redress from the company. A great distinction exists between a winding-up by the Court and a voluntary winding up: a winding up by the Court is a proceeding intended to realise the property of the company for the

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 8 Q. B. 244.
(3) Law Rep. 9 Q. B. 301.
(4) Law Rep. 5 P. C. 394, at pp. 411, 412, 413.
(5) Law Rep. 1 H. L., Sc., 145.

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benefit of the creditors; and hence no suit can be carried on which is likely to diminish the amount of assets: the Companies Act, 1862, ss. 85, 87, as to a compulsory winding up; ss. 148, 151, as to windings up under the supervision of the Court. But that statute does not contain any express provisions similar to these sections in respect of a voluntary winding up, and the claims of the plaintiffs are provable against the company under s. 158. A company that is being wound up voluntarily still exists in its corporate state: s. 131; and therefore it is capable of affording compensation to those shareholders who have been defrauded by its directors. The defendants may rely upon *Grissell's Case* (1), *Oakes* v. *Turquand* (2), *Black & Co.'s Case* (3); but in none of those cases was the winding-up merely voluntary. Moreover, in them the contest was, whether a defrauded shareholder was liable to be kept upon the list of contributories for the benefit of the creditors; but the claim of the plaintiffs, in these actions to repudiate their status as shareholders, is a question arising between themselves and the company. No real authority exists for saying that after a voluntary winding up has commenced a member cannot disaffirm the contract to take shares, but, at all events, the plaintiffs are entitled to maintain actions for unliquidated damages upon the ground of fraud.

Then, as to the counter-claim in the action brought by Stone, the memorandum and articles of association required that when a call should be made by the directors they should appoint a time and a place for payment; as the resolution of the 18th of May, 1875, did not provide for these particulars, it was invalid and the omission could not be remedied after the winding up had commenced; the liquidator could not then supplement the resolution by giving notice of a time and place.

Whitehorne, for the plaintiff Stone. Under the practice established by the Supreme Court of Judicature Acts, 1873 and 1875, amendments may be made at any stage, however late, of the cause: *King* v. *Corke* (4); *Roe* v. *Davies* (5); and as the fraud of

(1) Law Rep. 1 Ch. 528.
(2) Law Rep. 2 H. L. 325.
(3) Law Rep. 8 Ch. 254.
(4) 1 Ch. D. 57.
(5) 2 Ch. D. 729.

the directors is clearly established every assistance ought to be afforded to the plaintiffs in obtaining redress.

As to the question upon the merits, it is to be observed that in *Oakes* v. *Turquand* (1) the winding up was subject to the supervision of the Court, whereas in the present action the winding-up was voluntary. It is contended that there was no valid winding-up; by the agreement of the 27th of May, 1875, the whole assets of the bank were to be transferred to Brown, Janson, & Co., who were to pay the debts and liabilities mentioned in the schedule thereto; therefore the agreement favoured a particular class of creditors. The resolutions for winding up the defendant's company passed upon the 16th of July were based upon and incorporated this agreement and were void, because they contravened the Companies Act, 1862, s. 131, sub-s. 1, which directs that upon a voluntary winding up the assets shall be applied, pari passu, in satisfaction of the liabilities. But even if the resolution to wind up is good, *Hall* v. *Old Talargoch Lead Mining Co.* (2) is a strong authority to shew the present actions are maintainable; the relief claimed by the plaintiff was of a similar nature, and Bacon, V.C., declined to stay the action upon the ground of the winding-up. It is also submitted that the real foundation for *Oakes* v. *Turquand* (1) is that a compulsory winding-up, or a winding-up under the supervision of the Court, is in the nature of a bankruptcy; now a voluntary winding-up is only in the nature of an administration suit: *In re Keynsham Co.* (3); *In re Life Association of England* (4); *In re Peninsular, &c., Banking Co.* (5); *In re Poole Firebrick and Blue Clay Co.* (6)

[COTTON, L.J. It has been held that upon a compulsory winding-up a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely for the balance remaining due after realising or valuing his security: *Kellock's Case* (7); the reason is, that a compulsory winding up is not a proceeding subject to all the incidents of bankruptcy. The use of the terms "bankruptcy" and "administration" is misleading;

(1) Law Rep. 2 H. L. 325.
(2) 3 Ch. D. 749.
(3) 33 Beav. 123.
(4) 34 L. J. (Ch.) 64.
(5) 35 Beav. 280.
(6) Law Rep. 17 Eq. 268.
(7) Law Rep. 3 Ch. 769.

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the plaintiffs in the present actions must make out that a voluntary winding up is not a proceeding for the payment of debts or for the benefit of creditors.]

It may be that a person who has been induced to take shares by fraud may be a contributory as to the creditors, but he is not a member as to the company; in a voluntary winding up the creditors are not directly concerned, and it was not intended that they should in a proceeding of that kind be brought into immediate relation with the shareholders.

R. V. Williams, for the plaintiff Collins. The general scheme of a voluntary winding up, as set forth in the Companies Act, 1862, s. 129 to s. 146, shews that it is a proceeding for the benefit of shareholders: it is not a proceeding primarily for the benefit of creditors, who are scarcely mentioned in this portion of the statute.

It may be admitted for the plaintiffs, that according to the decision in *Oakes* v. *Turquand* (1), a member cannot repudiate his liability to the creditors so as to get his name erased from the list of contributories, although he may have been induced to take his shares by fraud. That case was based chiefly upon the decision in *Henderson* v. *Royal British Bank* (2); but the judgment of the Court of Queen's Bench proceeded upon the ground that a shareholder having held himself out as a member, cannot withdraw his name from the list of contributories; in the present action there is no estoppel as against the plaintiffs in favour of the defendants; all the assets of the company were sold to Brown, Janson, & Co. at the time when the winding up was resolved upon; therefore, although the plaintiffs might be liable to pay calls for the benefit of creditors, they are not liable to contribute to the assets which are to be taken by Brown, Janson, & Co. The latter are now substantially the only creditors, and as they did not become creditors upon the faith of the plaintiffs being members of the company, the reasoning in *Oakes* v. *Turquand* (1) does not apply: that case merely decided that a contract to take shares, though induced by fraud, cannot be avoided to the detriment of other innocent parties, and Brown, Janson, & Co. having bought the assets, stand in the same position as the company.

(1) Law Rep. 2 H. L. 325. (2) 7 E. & B. 356; 26 L. J. (Q.B.) 112.

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[BRETT, L.J. The decision in *Oakes* v. *Turquand* (1) did not proceed upon estoppel, but upon the disability of the defrauded shareholder to annul the contract.]

Under the practice now established, the Court may amend at any stage: *Budding* v. *Murdoch* (2); and although Lindley, J., has refused to amend, yet this Court may overrule his decision if he has proceeded upon a wrong principle: *Watson* v. *Rodwell.* (3)

Cohen, Q.C. (*Wood Hill* with him), for the defendants. A voluntary winding up is a proceeding for the benefit of creditors. In the *Brighton Arcade Company* v. *Dowling* (4), the Court of Common Pleas appear to have thought that a voluntary winding up was a matter which concerned only the shareholders, but that case was disapproved of in *Black & Co.'s Case.* (5)

[*Cohen, Q.C.*, was directed to confine his argument to the validity of the counter-claim in the action brought by Stone.]

It is only necessary to refer to the conclusion of the judgment of Lindley, J., for the purpose of shewing that the liquidator has power to enforce the informal call made by the directors.

Russell, Q.C., was not heard in reply.

BRAMWELL, L.J. I am of opinion that owing to the form which the proceedings in these actions have taken, the plaintiffs are not entitled to recover in respect of claims for unliquidated damages. In the action brought by Stone a special case has been stated by an arbitrator, and the questions thereby put to us are whether the plaintiff is, under the circumstances therein set forth, entitled to recover against the defendants the sum of 500*l.* and interest, and whether the defendants are entitled to recover against the plaintiff the sum of 200*l.* and interest. It did occur to me that the plaintiff might perhaps properly argue that the arbitrator had no right to determine what were the questions to be submitted to the Court, but upon further consideration I think that the parties must be taken to have agreed that these shall be the questions, and that we ought not now to allow any other question to be discussed. In the action brought by Collins, the

(1) Law Rep. 2 H. L. 325.
(2) 1 Ch. D. 42.
(3) 3 Ch. D. 380.
(4) Law Rep. 3 C. P. 175.
(5) Law Rep. 8 Ch. 254.

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declaration is for money received for his use and for interest, and by the particulars a sum of 30*l.* is claimed, and it is plain from the subsequent pleadings that this is the sum which he was induced to part with in order to become a shareholder in the defendants' company. In neither action does the plaintiff sue for unliquidated damages, and each action is brought to recover back the money obtained from the plaintiff by the defendants' fraud. This was much the better way of presenting the claim of the plaintiff in each action, for it would be more advantageous to him to get back the money which he paid, or at least to obtain a judgment for it, with the consequence which would probably follow that he would not be liable as a contributory, than to have a judgment for damages which probably he would never be able to realise by any execution or by any proof against the defendants' assets. My Brother Lindley refused to amend; it has been argued that we ought to amend; but in each of the actions before us the case for the plaintiff has been shaped in a particular manner, and, as may be surmised, for a particular reason, and I think that we ought not to reverse the decision of my Brother Lindley in a matter lying wholly within his discretion. I confess that I have had misgivings as to whether we ought not to amend; for I incline to think that if these actions had been brought for unliquidated damages accruing from the fraud of the defendants committed through their general and authorized agents, the plaintiffs might have succeeded, and if they had succeeded, it is at least doubtful whether their claims would have been postponed to those of other creditors as being sums due to them "by way of dividends, profits, or otherwise," within the meaning of the Companies Act, 1862, s. 38, sub-s. 7. It is, however, unnecessary to pursue this matter further, as we have come to the conclusion that we ought not to amend.

Then arises the question whether, upon the form which the proceedings have taken, the plaintiffs are entitled to recover. The defendants contend that the plaintiffs cannot succeed because there has been a winding up, and they rely upon *Oakes* v. *Turquand* (1). Upon behalf of the plaintiffs it was attempted to distinguish that decision; it was pointed out that in that case the

(1) Law Rep. 2 H. L. 325.

company was being wound up under the supervision of the Court of Chancery, whereas the defendants' company is being wound up voluntarily. I cannot think that this circumstance makes any difference in point of principle. It was argued that a compulsory winding up, or a winding up under the supervision of the Court, is in the nature of a bankruptcy or a statutory execution for the benefit of the company's creditors. I will assume that this argument is correct. But it makes no difference as to what I understand to be the principle of *Oakes* v. *Turquand* (1), which is this: where a company is shewn by a winding-up to be insolvent, and where the remedies of the creditors, who have trusted the company upon the strength of the uncalled capital and of the names upon the register, would be interfered with by the withdrawal of members, the power to rescind a contract to take shares is gone. This principle seems to me to apply as strongly to a voluntary winding up as to a winding up under the supervision of the Court. It was also contended by Mr. Williams that *Oakes* v. *Turquand* (1) does not apply, because Messrs. Brown, Janson, & Co. are now the only creditors of the company. I cannot assent to that. I think that the effect of the arrangement with Brown, Janson, & Co. is to empower them to call upon the company or the liquidator to put in force for their benefit as purchasers of the assets all the remedies, which might have been put in force for the benefit of the creditors.

It was also contended by Mr. Whitehorne that the resolution to wind up, and therefore the winding up itself, were nullities; and the ground of his argument was that the fourth resolution passed at the meeting of the 16th of July, 1875, was bad and avoided the other resolutions. I think it a sufficient answer to this contention that the second resolution is good in itself; it simply states that the bank shall be wound up, and not that the bank shall be wound up upon the terms of the following resolutions. The second resolution is not combined with the other resolutions, but stands upon its own footing; therefore, in my opinion it is good, even if the fourth resolution is bad. I have strong doubts, however, whether the fourth resolution is bad. The objection to it is that it mis-recites the agreement of the 27th of May, and

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treats it as providing for the payment of the debts and liabilities of the bank, whereas in truth it was an agreement for the payment only of the debts and liabilities of the bank stated in the schedule annexed thereto; but, at the hearing before the Lords Justices, Brown, Janson, & Co. undertook by their counsel to pay all the debts of the bank, and this agreement for a more extended liability appears to have cured the defect arising from the misrecital in the fourth resolution of the 16th of July. I therefore doubt whether that resolution is open to the objections urged against it, and at all events it is not on its face ultrà vires the company. For these reasons I think that the resolution to wind up was valid.

It was also urged before us that even if in a voluntary winding up a person, who has been induced to become a member of a company by fraud, cannot get rid of his liability by rescinding within a reasonable time his contract to take shares, and must be placed upon the list of contributories for the benefit of creditors nevertheless as between himself and the other members of the company, with whom he has become associated through the fraud of their agents, he may be entitled to recover back the money which he has paid. I cannot assent to that argument. It seems to me to follow that a shareholder is a member of the company for all purposes, and that the remedy of a person, who has been induced to become a shareholder by fraud of the company, is by an action for unliquidated damages, and not by an action to recover as a debt due to him the money which he has been induced to part with. Mr. Williams contended that the reason why a defrauded shareholder is liable to the creditors of the company is that, having held himself out as a member, he is estopped from saying that he ought not to be a contributory upon the insolvency of the company. I doubt whether a shareholder is liable upon the ground of estoppel. I think his liability depends upon a principle similar to that upon which the decision in *Kingsford* v. *Merry* (1) proceeded. It was there held that if the owner of goods sells them owing to a fraudulent representation, and if before he discovers the fraud another person acquires some claim to them, he cannot afterwards rescind the contract. And I think it clear

(1) 11 Ex. 577.

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upon the authorities that whenever the rights of other persons intervene, a contract to take shares, though induced by fraud, cannot be rescinded.

It was objected to the defendants' right to recover upon the counter-claim that the liquidator could not give notice, where and to whom a call made by directors before the winding up was to be paid, when they had omitted these particulars; it is sufficient to say that I think that he could give such a notice.

I will state briefly the conclusions at which I have arrived: I think that the resolution to wind up voluntarily is good, and that the principle of *Oakes* v. *Turquand* (1) shews that where a company is being wound up either compulsorily, voluntarily, or under the supervision of the Court, it is too late to rescind a contract to take shares, although that contract has been induced by fraud. I therefore am of opinion that judgment must be given for the defendants.

BRETT, L.J. I agree that we ought not to allow any amendments in these actions. I am of that opinion because neither of them was really brought to recover damages for fraud; they were brought and were substantially contested on the ground that the plaintiffs were entitled to rescind the contracts to take shares and to recover back the prices paid for them, and I think that when actions have been brought and contested in order to enforce one remedy, the Court is not called upon, and in exercise of its discretion ought not to amend so as to give substantially a new remedy. I may add that in my opinion Lindley, J., was right in refusing to amend.

But the question arises whether the plaintiffs can recover for unliquidated damages without any amendment. In the action brought by Stone the questions stated for the opinion of the Court must be taken to have been agreed upon by the parties when the special case was stated; and these questions do not allow the plaintiff to claim unliquidated damages. In the action brought by Collins, the defendants by their second plea admit that by their directors they have made fraudulent representations to induce the plaintiff to take shares; but I do not think that an admission of

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fraud, made merely for the purpose of defeating the plaintiff's claim, is enough to entitle him to treat the action as one for unliquidated damages, he having by the declaration asked for a different remedy. I think, therefore, that owing to the manner in which the proceedings in the present actions have been shaped the plaintiffs cannot recover for unliquidated damages without an amendment, which, as I have before said, ought not to be made.

We must, therefore, treat both actions as based upon claims by the plaintiffs to rescind the contracts to take shares in the defendants' company and to recover back the prices paid for them. I am of opinion that upon the facts proved in one case and stated in the other the plaintiffs could not rescind the contracts after the voluntary winding up had commenced. In my opinion *Oakes* v. *Turquand* (1) really decided that upon the true construction of the Companies Act, 1862, the members of a company, although they have been induced to take shares by fraud, are prevented from rescinding their contracts after the winding up has commenced. A voluntary winding up commences when the resolution to wind up is passed; and therefore, after that time, a shareholder cannot escape from liability to contribute to the payment of the company's debts.

But in order to take these actions out of the principle laid down in *Oakes* v. *Turquand* (1) ingenious arguments have been put forward:—First, it was contended that according to the Company's Act, 1862, upon a voluntary winding up the assets of the company must be distributed rateably among the creditors, and that the terms of the winding up of the defendants' company were inconsistent with the intention of that statute, because that winding up was founded upon the agreement with Brown, Janson, & Co., and that agreement did not bind them to pay the plaintiffs if they could succeed at some future time in establishing their claims for damages. I am prepared to hold that even although this were the effect of the agreement with Brown, Janson, & Co., it would not render the resolution to wind up a nullity; that resolution was in other respects passed according to the Companies Act, 1862; and the winding up under it must be taken to be valid, at all events until some Court of competent jurisdiction shall supersede the

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proceedings and order a winding up under supervision or a compulsory winding up. Therefore the resolution to wind up is binding upon the plaintiffs. It is unnecessary to consider what is the effect of the agreement with Brown, Janson, & Co., as modified by what took place before the Lords Justices: they were then represented by counsel, and the undertaking then given was entered into in order to induce the Court to act, and did induce the Court to act; it is true that Brown, Janson, & Co., by the document of the 27th of May, agreed to pay only the debts and liabilities of the bank stated in the schedule thereto, but it seems to me possible to say that they must be taken in the end to have agreed to pay, not only all existing or scheduled debts and liabilities of the company, but also all future debts and liabilities which may become provable against the company, and therefore that they will be bound to satisfy the claims of the present plaintiffs for unliquidated damages when the latter have turned these claims into debts by obtaining judgments. At the present moment, however, I only desire to say that I wish to treat the liability of Brown, Janson, & Co. to the plaintiffs as an open question.

Secondly, it was contended that these actions were distinguishable from *Oakes* v. *Turquand* (1), because that was not a decision between a shareholder and a company, but a decision between a shareholder and the creditors of a company, and because the liability of a shareholder in favour of the creditors was put upon the ground of estoppel. But in my opinion the judgment in *Oakes* v. *Turquand* (1) did not proceed upon the ground of estoppel, nor did it proceed upon the ground that a compulsory winding up or a winding up under supervision is to be considered as in the nature of a bankruptcy, and that a voluntary winding up is to be considered as in the nature of an administration suit. I am of opinion that the judgment in *Oakes* v. *Turquand* (1) cannot be said to be a decision as between a shareholder and creditors, but that it was a decision between a shareholder and the liquidator of the company representing the company; the true reason of the decision seems to me to be that the existence of the creditors prevents a member, although he has been induced to take his shares by fraud, from rescinding his contract after the commencement of a winding

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up under the Companies Act, 1862, whatever may be the nature of that winding up; and if he continues a member, and if his name remains upon the register, of course he can be made a contributory. The reasoning in *Oakes* v. *Turquand* (1) seems to me to apply just as much to a voluntary winding up as to a compulsory winding up or a winding up under supervision; none of these kinds of winding up are to be deemed bankruptcies; they are all modes of dealing with companies in difficulties to be substituted for proceedings in bankruptcy, and they all fall within the principle of *Oakes* v. *Turquand*. (1) I am, therefore of opinion that neither plaintiff can recover in respect of the claim which he has put forward.

As to the counter-claim in the action brought by Stone, I am of opinion that it is valid, and that the defendants are entitled to succeed upon it.

COTTON, L.J. I think it unnecessary to add anything on the question whether leave to amend should have been given by Lindley, J., and should now be given by us, except this, namely, that although, under ordinary circumstances, the widest liberty of amendment ought to be allowed, so that the real question between the parties may be decided without further litigation, yet in these actions, for the reasons stated by the Lords Justices, the learned judge was right in refusing to amend, and we ought not now to give liberty to amend.

I have no doubt that the question really intended to be raised in these actions was, whether the plaintiffs could rescind their contracts with the company by which they became shareholders: it seems plain that this was the question at issue between the parties, because the actions are brought to recover the sums paid for the shares as money received for the use of the plaintiffs, and can be maintained in this form only upon the ground that the plaintiffs are at liberty to say that they are not shareholders. If the company were solvent the plaintiffs would probably be entitled to contend that they are not members: but as a bar to the relief claimed, the defendants rely upon the voluntary winding up. The plaintiffs' counsel have argued that the winding up is a nullity: but there is a distinction between its being voidable and its being

(1) Law Rep. 2 H. L. 325.

a nullity: possibly the points urged on their behalf may form good reasons for inducing the Chancery Division, on a petition for winding up compulsorily, to supersede the voluntary winding up, and to make an order for a compulsory winding up; but that is not a matter before us, and I think it impossible to say that the voluntary winding up is a nullity; for a general meeting has passed valid resolutions for that purpose. The first and second resolutions relate to the winding up, and are in themselves good: they at least cannot be treated as nullities, whatever may be said of the fourth resolution confirming the agreement to hand over the assets of the bank to Brown, Janson, & Co., for the purpose of carrying out the arrangement which had been entered into. I look upon the resolutions as separate: some may be bad and others good: and the resolutions to wind up are independent of the rest and cannot be impeached, because some other resolution may be bad.

Then comes the question whether the winding up is a bar to rescinding the contracts to take shares. In order to see how far *Oakes* v. *Turquand* (1) (which of course we must follow) is applicable to this case, we must consider what relief the plaintiffs in these cases are seeking to obtain. In both cases they are seeking to recover back money which they have paid, and the ground upon which they claim relief is that they were induced to become members of the company by fraud. In *Oakes* v. *Turquand* (1) the appellant, upon the same ground, claimed to have his name removed from the list of contributories. In these actions, as in that case, there was but one contract from which relief was sought, namely, a contract with the company. If in that case the House of Lords had held that the contract might be rescinded, the name of the appellant would have been taken off the list of contributories, and the plaintiffs in these actions would have been entitled to recover back the money which they have paid to the company for their shares; but as the House of Lords decided in that case that the contract could not be rescinded, we must determine whether a voluntary winding up is within the principle of that case. It is very true that in that case the ground of refusing to allow the appellant to rescind his contract with the company was

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that the rights of creditors had arisen, that is to say, proceedings were being taken under the Companies Act, 1862, to pay them. In the present actions surely the same objection applies to the rescission of the contracts with the company. It is true that there is a difference in the mode of winding up: in compulsory winding up, or in winding up under the supervision of the Court, the creditors can take part in the proceedings, and can at all times apply to the Court; whereas, in a voluntary winding up, the creditors can only change a voluntary winding up into a winding up subject to supervision, or into a compulsory winding up. In these actions the voluntary winding up was founded upon a declaration under the Companies Act, 1862, s. 129, that it had been proved to the satisfaction of the shareholders assembled in general meeting that the company could not by reason of its liabilities continue its business, and that it was advisable to wind it up. That was practically a declaration of insolvency. What were the consequences? Section 133 clearly imposes upon the liquidator the duty of immediately providing for the distribution of the assets amongst the creditors; and therefore a voluntary winding up, as much as a compulsory winding up, does render it imperative in the first instance to apply the assets in payment of the company's debts; and amongst those assets, which under s. 133, sub-s. 1, are to be distributed in the first instance in paying the debts, are to be included any unpaid calls. According to *Oakes* v. *Turquand* (1), no person, who at the commencement of the winding up is de facto a member, that is, who has by a contract not previously avoided become a member, can withdraw from the distribution for the benefit of the creditors any part of the company's assets, either by recalling money paid by him to the company or by taking himself off the list of contributories, that is to say, by taking himself out of the category of those liable to pay further calls: in consequence of the distribution of assets amongst the creditors a member cannot insist upon the equity which he might otherwise have claimed to be relieved from his contract with the company. I think that the principle of *Oakes* v. *Turquand* (1) applies to this case. Reference was made to certain cases where actions at law against companies were stayed when they were

(1) Law Rep. 2 H. L. 325.

being voluntarily wound up, although the Companies Act, 1862, does not contain any express power to do so, and in some of these cases the late Master of the Rolls likened a voluntary winding up to an administration suit: an administration suit does not necessarily imply insolvency, and hence it was argued that a voluntary winding up is not, at least primarily, a proceeding for the benefit of creditors. I think that the counsel for the plaintiffs did not sufficiently consider that it was not the mere existence of an administration suit, which enabled an executor to obtain a stay of actions at law against him, but that it was the existence of a decree providing for the distribution of the assets amongst all the creditors: therefore a voluntary winding up is like an administration suit in which a decree has been made for the benefit of all the creditors: and it is the intervention of the creditors' rights which in the one case entitles an executor to relief, and which in the other bars proceedings against an insolvent company. This analogy very much strengthens the view which I take of the position of a company when there has been a resolution for a voluntary winding up. In my opinion the decision in *Oakes* v. *Turquand* (1) applies to a voluntary winding up; and since this voluntary winding up is founded upon a valid resolution, it is a bar to these actions which are brought to enforce a supposed right to rescind the plaintiffs' contracts to take shares.

I will say a few words about the agreement of the 27th of May, 1875. It was not for the sale, in any reasonable sense of the word, of the assets of the bank to Brown, Janson, & Co., it was an agreement made with them to provide for the speedy payment of the company's debts; and, so far as appears, that agreement has been fulfilled. It is true that all the assets of the company were to be handed over to Brown, Janson, & Co., but that was to recoup them for the money which they should expend; the arrangement is not unusual, and has been made in other instances. This being the real nature of the arrangement, to my mind, it would not be right to hold that the position of the plaintiffs can be improved, because the assets of the company were not in the first instance to be paid to the creditors, but were to be handed over to persons who undertook to discharge the debts and liabilities of the bank.

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For all practical purposes, the shareholders must be taken to have been represented at the appeal before the Lords Justices upon the 28th of June, and liberty was given to the defendants to call a meeting of the shareholders for the purpose of considering the agreement of the 27th of May with Brown, Janson, & Co.; and it would almost have amounted to a failure of justice, if we had been bound to accede to the claims of the plaintiffs in these actions on the ground, that the resolutions to wind up voluntarily were bad, or that the existence of that agreement gave them rights which they would not otherwise have had.

Judgment affirmed in each action.

Solicitors for plaintiff in each action: *Harper, Broad, & Battcock.*

Solicitors for defendants: *Janson, Cobb, & Pearson.*

Applied. LARNER *v.* FAWCETT. [1950] 2 All E.R. 727.

1878

June 5.

BARTHOLOMEW *v.* FREEMAN AND OTHERS.

Practice—Order of Court for the Sale of Goods—Order LII., rule 2*—Horses.*

An order in an action may be made under Order LII., Rule 2, for the sale of a horse which for a "just and sufficient reason it may be desirable to have sold at once."

MOTION, on appeal from Lopes, J., at chambers, for an order calling on the plaintiff to shew cause why a certain horse should not be sold "as in dispute," without warranty or reserve, at Aldridge's repository on a day named.

The horse was bought and paid for by the plaintiff at Aldridge's repository, of which the defendants are proprietors, for thirty guineas, and was warranted to draw. The conditions of sale provided that any horse so sold might, if considered by the buyer to be incapable of working from any infirmity or disease, be returned with a certificate from a veterinary surgeon, and if such certificate should not be confirmed by another, to be furnished by the vendor, the auctioneer should appoint a veterinary surgeon, whose decision should be final and binding, and the whole expense must be paid by the party in error.

The plaintiff, finding the horse lame, returned it with a certificate that it was incapable of work. The vendor not furnishing a

certificate, the defendants, as the auctioneers, appointed a veterinary surgeon, who examined the horse, and decided that the lameness decreased as the animal warmed, and therefore that it was capable of performing ordinary work.

The defendants consequently insisted that the plaintiff must retain the horse. A dispute arose as to its capacity, an action for breach of warranty was brought by the plaintiff, and the defendants' solicitor wrote to the solicitors of the plaintiff, "Will your client consent to the horse in question being sold at Aldridge's, 'as in dispute,' without warranty or reserve, and, of course, without prejudice to all parties? At present it is eating its head off without benefit to any one."

The plaintiff declined to consent. The defendants applied at chambers for an order under Order LII., Rule 2, and the plaintiff opposed the application which the master, who heard it, dismissed.

The defendants appealed to Lopes, J., who also made no order.

Channell, in support of the motion. The horse belongs to the plaintiff, and therefore cannot be sold by the defendants without an order of court. Such an order may be made under Order LII., Rule 2, for the sale "of any goods, wares, or merchandize, which may be of a perishable nature, or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once." A horse is certainly "goods," nor did Lopes, J., doubt it, but, following a decision of Quain, J., at chambers, which is cited in a note to Order LII., Rule 2; in Charley's Judicature Acts (3rd ed. p. 710), the learned judge thought that the defendants could sell without an order. There, however, the horse in question was indisputably the property of the applicant, a fact not clearly stated in the note. This horse is consuming its value. Neither party cares for the particular animal. There is "just and sufficient reason" to have it sold.

F. Turner, shewed cause. A horse is not "of a perishable nature or likely to injure from keeping," within Order LII., Rule 2.

[GROVE, J. I am inclined to agree with you; but "it may be desirable to have" it "sold at once." Why do you object to the sale?]

Because it is unnecessary. The defendants seek to dispose of the

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horse at a forced sale, where it will probably be sold for a sum less than it is worth, and to treat that sum as its value when damages are assessed in the action. [He cited *Walker* v. *Olding*. (1)]

GROVE, J. I think the defendants are entitled to an order for sale of the horse. The case comes sufficiently within the final clause of Order LII., Rule 2. There seems "just and sufficient reason" why it may be desirable to have the animal sold at once. I certainly should not make such an order if the horse were a valuable one for which either party particularly cared. But here neither of them values it per se nor wishes to keep it. It is now consuming its value in food, and I see no reason why it should not be sold. Were we to order that the sale should be made only when a good price could be obtained for the horse, our order would be practically useless. It must, of course, be sold at what is certainly to some extent a forced sale, and probably may not fetch its full value. If the price so obtained were taken as the value in the litigation pending, the parties might be prejudiced. Therefore our order must be without prejudice to the rights of the parties in any question which may arise in the action. Costs to be costs in the cause.

LINDLEY, J. I also think the case is within the latter words of Order LII., Rule 2. The defendants' object in having the horse sold is to save expense. It costs money to keep, and it is uncertain on whom the cost will ultimately fall. There is no cause for keeping the horse unsold. The plaintiff objected to the sale without an order, or without prejudice to any question in dispute, and it is quite obvious that his object was to put the defendants in a difficult position. The defendants could not possibly sell the horse against the rights which they asserted to be in the plaintiff. I think the plaintiff has unreasonably declined to allow the sale without prejudice, and that the defendants are justified in applying for an order which we therefore grant in the terms already stated.

Order accordingly.

Solicitor for plaintiff: *G. H. Oliver.*

Solicitors for defendants: *Dixon, Ward, & Co.*

(1) 1 H. & C. 621; 32 L. J. (Ex.) 142.

USILL *v.* HALES.
USILL *v.* BREARLEY.
USILL *v.* CLARKE.

1878
Jan. 30.

Libel—Privileged Publication—Ex parte Proceeding before a Police Magistrate in a Matter over which he has no Jurisdiction.

Three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate:—

Held, a privileged publication.

ACTIONS for libels published in the *Daily News*, the *Standard*, and the *Morning Advertiser*, respectively. The publication complained of consisted of a report of an application, made in public to a police-magistrate in London, for a summons against the plaintiff under the following circumstances:—The persons by whom the application to the magistrate was made were respectively civil engineers or surveyors who had been employed under the plaintiff, a civil engineer, in making surveys, &c., for a projected railway in Ireland. The applicants having heard that the plaintiff had been paid by the promoters for his services, and conceiving that he had improperly withheld from them the money which was due to them for theirs, made an ex parte application to the magistrate under the Master and Servant's Act. The magistrate, after hearing the statement of the parties, came to the conclusion that he had no jurisdiction to entertain the matter, and declined to grant the summonses. A report of the proceeding appeared in each of the newspapers in question on the following morning, in these terms,—

"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer, of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although

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from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and, although, on the face of the application, they had been badly treated, he must refer them to the county court."

The cause was tried before Cockburn, C.J., at Westminster, on the 15th of November, 1877. The learned judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged.

The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case.

Nov. 20, 1877. *Ballantine, Serjt.*, obtained rules nisi for new trials on the ground of misdirection. He contended that the publication being a report of an ex parte application to a functionary who had no jurisdiction to entertain it, and against one who had no means of answering the charges made against him, the privilege usually accorded to the publication of proceedings in a Court of Justice did not attach to it.

Jan. 29 and 30, 1878. *Sir H. Giffard, S.G., Bremner, Yelverton, Barnard,* and *Child,* shewed cause. The publication was privileged. Ex parte applications to a superior Court may undoubtedly be reported: *Curry* v. *Walter* (1); *Rex* v. *Wright* (2); and no distinction exists between such applications and similar proceedings before a magistrate sitting in public: *Lewis* v. *Levy.* (3) Privilege has of late years been denied to such reports on two grounds only, viz. where they have been accompanied by injurious comments, and where the proceeding was not final. Here, the reporter abstained from comment upon the case, but gave, as the jury found, a fair report of it; and the proceeding terminated on the magistrate dismissing the applicants. "It is now well established that faithful and fair reports of the proceedings of Courts

(1) 1 B. & P. 525. (2) 8 T. R. 293.
(3) E. B. & E. 537; 27 L. J. (Q.B.) 282.

of Justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible:" per Cockburn, C.J., in *Wason* v. *Walter*. (1) They "only extend that publicity which is so important a feature in the administration of the law of England, and thus enable to be witnesses of it, not only the few whom the Court can hold, but the thousands who can read the reports:" per Wilde, B., *Popham* v. *Pickburn*. (2) See also *Ryalls* v. *Leader*. (3)

[LORD COLERIDGE, C.J. I can understand that necessity for full investigation which is the reason for protecting persons who even abuse their privilege of speech in Courts of Justice; but I do not quite see the advantage the public can gain from the publication of what is said in abuse of the privilege. Can you cite a case where the report of an application to an inferior court in a matter beyond its jurisdiction has been held to be privileged?]

The magistrate had at least jurisdiction to inquire whether or not the matter of the complaint was one which he could further entertain. But, although it was held in *Buckley* v. *Wood* (4), that, if a charge is made against a man in a Court which has no jurisdiction, an action for defamation lies, yet in the subsequent case of *Lake* v. *King* (5), the Court said that, notwithstanding what is reported in 4 Rep. 14 b, in *Buckley's Case*, it was held that want of jurisdiction will not make a libel.

Ballantine, *Serjt.*, and *J. Shortt*, in support of the rule. The report in question was not privileged. If the doctrine of privilege is based on the supposed benefit to the community resulting from the publicity of trials, no advantage to the public could be shewn in the present case. The application was one which the magistrate could not grant. *Curry* v. *Walter* (6) was never finally decided, and was said by Abbott, C.J., in *Duncan* v. *Thwaites* (7), not to have received the sanction of subsequent judges. In *Lewis* v. *Levy* (8) Lord Campbell said: "As to magistrates, if, while occupying the bench from which magisterial business is usually

(1) Law Rep. 4 Q. B. 73, 87.
(2) 31 L. J. (Ex.) 133, 136.
(3) Law Rep. 1 Ex. 296, 299.
(4) 4 Rep. 14 b.
(5) 1 Vin. Abr. 389.
(6) 1 B. & P. 525.
(7) 3 B. & C. 556, 583.
(8) E. B. & E. 537, 554.

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administered, they, under pretence of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics assembled in an alehouse." The magistrate had not jurisdiction here to grant the summons asked for, and the application was substantially for advice only. No case has been cited where the report of an ex parte application *dismissed* was held to be privileged. The only proposition established by *Lewis* v. *Levy* (1),—the case most favorable to the defendants,—is, that the reports of proceedings rightly taken in a Court of competent jurisdiction may be privileged. There, the Court had power to hear the charge, and evidence was given on oath. Not so in the present case. Can it be contended that any statement, however false and defamatory, made to a magistrate in open Court may lawfully be published and its injurious effect thereby immeasurably increased? Between motions for criminal informations in the Queen's Bench Division and applications such as that made by the parties here three distinctions exist,—1, the Queen's Bench has jurisdiction to grant a criminal information,—2, the application must be supported by affidavit,—3, it *must* be made by counsel, who are not likely to misuse their right of speech: see *Rex* v. *Brice*. (2) "The publication of proceedings in Courts of Justice, *where both sides are heard and matters are finally determined*, is salutary, therefore it is permitted:" per Lord Ellenborough, C.J., in *Rex* v. *Fisher* (3). The whole subject was discussed in *Duncan* v. *Thwaites* (4), where Abbott, C.J., delivering the judgment of the Court of King's Bench, said: "This Court has on more than one occasion within a few years been called upon to express its opinion judicially on the publication of preliminary and ex parte proceedings, and has on every occasion delivered its judgment against the legality of such proceedings." And so late as the year 1850, Maule, J., excepts the publication of ex parte proceedings from those which are justifiable: *Hoare* v. *Silverlock*. (5) So, in *Davison* v. *Duncan* (6),

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.
(2) 2 B. & A. 606.
(3) 2 Camp. 563.
(4) 3 B. & C. 556.
(5) 9 C. B. 20, 23.
(6) 7 E. & B. 229, 232.

Coleridge, J., said: "Now, if the publication be a fair account of a proceeding not ex parte in a Court of justice, it is privileged." Suppose a man were to go before a magistrate and ask for criminal process against another for the seduction of his wife or daughter; would a report of such an application,—which the magistrate could not entertain, and which therefore would be a proceeding without legitimate beginning or ending, but whose only object could be to vilify and defame the accused,—be a privileged publication? And yet it must be so if the argument on the other side is to prevail. [*Saunders* v. *Mills* (1) and *Kane* v. *Mulvaney* (2) were also referred to.]

LORD COLERIDGE, C.J. I am of opinion that this rule must be discharged. There were three several rules, but only one has been argued, it having been agreed that the judgment in the first case should bind the parties in the other two.

This was an action against the proprietor of a newspaper for publishing a bonâ fide and fair report of proceedings before a magistrate. Three persons, surveyors, who had been employed by a civil engineer to assist in the construction of a railway in Ireland, hearing that their employer had been paid, and conceiving that the money due to them had been improperly withheld by him, went before a police magistrate in London, and (I must take it for the purpose of my judgment, and do so take it) applied to him for a summons or order under the Masters and Workman's Act. In the result, the magistrate thought that the facts stated by the complainants shewed no ground for a summons against the plaintiff under the Act; and therefore in the result it turned out that, in a certain sense, an application had been made to the magistrate with regard to a matter as to which he had no jurisdiction. I say in a certain sense: but it has been long held, and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and that, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that juris-

(1) 6 Bing. 213. (2) Ir. Rep. 1 C. L. 402.

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diction which, if the facts make out the case, undoubtedly he has. And the distinction between a real and inherent want of jurisdiction on account of the nature of the complaint, and what may be called resulting want of jurisdiction because the facts do not make out the charge, is very well explained, in language far better than I can use, in the well-known case of *Reg.* v. *Bolton* (1); and that case is founded mainly upon the very celebrated case of *Brittain* v. *Kinnaird.* (2) The luminous judgment of Sir John Richardson in that case has long been considered the locus classicus on this subject. I must therefore take it that the magistrate had jurisdiction to enter upon the inquiry: consequently what was done during the inquiry which the magistrate had jurisdiction to initiate was a matter which can only be described as a judicial proceeding; it was a proceeding before a judge who had, so far as that proceeding went, jurisdiction to hear and entertain it. That seems to be clear upon principle and upon authority. If so, the publication in question was primâ facie a privileged publication, because it was a publication, found by the jury to be fair and bonâ fide, of a judicial proceeding; and it is too late now to dispute whether the rule of privilege does or does not extend to the publication of such proceedings.

It has been laid down again and again in broad terms that the publication of the proceedings in Courts of Justice is privileged if the report of such proceedings be fair and honest; and this is so found to be. An attempt however has been made (and Mr. Shortt will allow me to say that, if it were possible to have succeeded, I think his argument would have succeeded, because he has said everything that could be said, and has said it well,) to distinguish this case and take it out of the general proposition, by bringing it within an undoubted qualification which has been grafted upon that general proposition, viz. that the application to the magistrate here was what may be called an ex parte or a preliminary proceeding. Now, there is no doubt that, in many cases to which Mr. Shortt has referred, the term "ex parte proceeding" has been over and over again used by judges of great eminence, sometimes affirmatively to say that an ex parte proceeding is not privileged, and sometimes negatively to say, this, being a proceeding not ex

(1) 1 Q. B. 66. (2) 1 B. & B. 432.

parte, is privileged; and I do not doubt for my own part that, if this argument had been addressed to a Court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day. Speaking frankly,—and it is useless, if a case has made a certain impression upon your mind after you have done the best you can to understand it, to say it has not made that impression,—it seems to me quite plain that in such cases as *Rex* v. *Fleet* (1) judgments of great judges do lay down the rule that an ex parte or preliminary proceeding is not privileged on the ground, good or bad, that it is very hard upon an individual to have a matter stated against him behind his back which he has no means of answering; and that oftentimes an accused person will come to trial, if he be tried, with a heavy weight of prejudice; where the case against him has been reported in the public newspapers, and his own answer, if he has one, from the necessities of the case has not been similarly made known. No doubt there are very strong observations in those cases adopted in *Duncan* v. *Thwaites* (2) which go very far to maintain that proposition. There is also a dictum of one of the greatest authorities in our law, Lord Eldon, than whom few greater lawyers have ever sat in Westminster Hall, who is reported, by Mr. Starkie (3), to have once observed that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall to learn that the publication of ex parte proceedings was legal.

But we are not now living, so to say, within the shadow of those cases: and it is idle to deny that there are cases since that time, in which the decisions I have just now referred to have been brought to the attention of the learned judges, where the Courts have been pressed with the authority of those decisions, and have come to conclusions which it is not for me to say are inconsistent, but which I am perfectly unable to reconcile with those earlier cases: and I find what I think is excellent good sense in the judgment of the Court of Queen's Bench in the case of *Wason* v. *Walter* (4), which explains how that is. It is a passage which one of the learned counsel read to us, and it is a passage which upon the whole I should desire to adopt and adhere to: "Whatever

(1) 1 B. & A. 379.
(2) 3 B. & C. 556.
(3) Starkie on Libel, 4th ed. p. 191 (9).
(4) Law Rep. 4 Q. B. 73.

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disadvantages attach to a system of unwritten law,—and of this we are fully sensible,—it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized." And then the passage goes on,—"Even in quite recent days judges, in holding the publication of the proceedings of Courts of justice lawful, have thought it necessary to distinguish what we call ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this Court, as, for instance, on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard of; and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the honest publication, and innocent of all intention to do injury to the reputation of the party affected." Now, to the general line of argument in that passage, and to the accuracy of the statement in the last sentence I have read, I entirely adhere; and it is familiar that not only are unimportant cases and ex parte proceedings published, but a particular class of inquiries which in some of the earlier cases I find actually by name excluded from the privilege,—I mean inquiries before a coroner,—are in cases which may be supposed to interest the public reported in all the newspapers in the kingdom; and yet no one ever heard, at least since I have known Westminster Hall, of an action being brought by a person injuriously affected by such publication, where the report is honest and bonâ fide, and published without intention to injure. That, therefore, seems to introduce this element into the

determination of these cases, that there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the Courts have from time to time applied as best they may what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them. If there had been a case directly in point in which a proceeding such as this, where the matter was at an end, and where the publication had been found by the jury to have been bonâ fide, honest, and fair, had been held by a Court of co-ordinate jurisdiction not to be privileged, I do not hesitate to say for my own part that I should have gladly acted upon it, because I do not disguise that my own judgment is not at all satisfied with the enormous advantage to the public of having every small personal matter reported day by day, often to the extreme pain and injury of individuals, which is supposed to form its justification. Nevertheless, I feel it to be the duty of a judge not to declare what he considers the law ought to be, but to decide according to what to the best of his judgment he finds it is: and, if he finds a principle laid down upon competent authority, it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it.

I come therefore to the consideration of this case feeling that the general tendency of the law has been to hold such a publication as this to be within the protection of the privilege. Now, I do find one case which to the best of my judgment appears to cover this case, and from which I am unable, according to the principle laid down in it, to distinguish the case now before us. It is a case to which much reference has been made, and which Mr. Shortt has dealt with at considerable length, viz. *Lewis* v. *Levy* (1); and it has no doubt a most important bearing upon this question. I do not propose to read the elaborate judgment delivered by Lord Campbell in that case: it is well summed up in these words,—"The rule, that the publication of a fair and correct report of proceedings taking place in a public Court of Justice is privileged, extends to proceedings taking place publicly before a

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.

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magistrate on the preliminary investigation of a criminal charge terminating in the discharge by the magistrate of the party charged." I am perfectly aware that there may be subtle distinctions,—distinctions which I will not say are merely shadowy, but which are subtle,—between the facts of that case and those of the case now before us: but I cannot disguise from myself that the ratio decidendi and the argument by which the Court was there led to hold such proceedings to be privileged, do in effect cover this case. I am of opinion that this is a case in which there was a judicial proceeding terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis* v. *Levy* (1) from that involved in the present case: and I adopt what is said there (2) of the old,—and I may say great case, because it was decided by judges of high authority,—of *Curry* v. *Walter* (3), so far back as the year 1796. That case is adopted by the Court of Queen's Bench in a written judgment in the year 1858, as a ground of their decision; and, whatever may have been said about it in some of the intermediate cases, and the doubts that have been thrown upon it by some eminent judges, it must I think be considered to be completely rehabilitated by the judgment of the Court of Queen's Bench in *Lewis* v. *Levy*. (1) I am content, therefore, to rest my judgment in this case upon the principles laid down in *Curry* v. *Walter* (3) and deliberately re-affirmed in *Lewis* v. *Levy* (1), and to say that, upon the principles there laid down, I am of opinion that this rule must be discharged.

LOPES, J. In this case three men who believed themselves aggrieved by the conduct of the plaintiff in respect of the payment of their wages, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate refused the application, considering it a matter for a civil and not for a criminal Court. The defendant afterwards published a report which the jury have found was a fair report of what occurred.

On principles of public convenience, the ordinary rule is that

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.

(2) E. B. & E. at p. 559.

(3) 1 B. & P. 525.

no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals.

It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to shew that want of jurisdiction will not take away the privilege, if it is maintainable on other grounds. Nor do I think the privilege is confined to the superior Courts: it is not the tribunal, but the nature of the alleged judicial proceeding which must be looked at.

The point mainly relied on by the plaintiff was, that the application to the magistrate was ex parte, and as such could not be privileged.

Had the matter before the magistrate been in the nature of a preliminary inquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority at any rate for the plaintiff's contention, though how far those authorities might be followed in the present day I think doubtful. But the matter of the application was *finally* disposed of by the magistrate; and I can find no case where a fair report of a judicial proceeding *finally* dealing with the matter in open Court has been held libellous. There are authorities which, until they are carefully examined would seem to support the contention that an ex parte proceeding in Court is not privileged. So far as I can ascertain, these are all cases where the proceeding was *preliminary*, and where there was no *final* determination at the time of the alleged libellous report. On the other hand, *Curry* v. *Walter* (1) and *Lewis* v. *Levy* (2) are strong authorities in favour of the report in this case being protected.

Rule discharged.

Solicitors for plaintiff: *Carr, Fulton, & Co.*
Solicitors for defendant Hales: *Ashurst & Morris.*
Solicitors for defendant Brearley: *J Goren.*
Solicitors for defendant Clarke: *H. J. & T. Child.*

(1) 1 B. & P. 525. (2) E. B. & E. 537; 27 L. J. (Q.B.) 282.

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Feb. 15

[IN THE COURT OF APPEAL.]

YGLESIAS *v.* THE MERCANTILE BANK OF THE RIVER PLATE.

Bill of Exchange—Discharge of Parties from Liability on Bill of Exchange—Principal Debtor.

The plaintiff obtained from the defendants an advance of 15,000*l.* upon the security of goods then in transit to Monte Video consigned to one S., and also of six bills of exchange drawn by the plaintiff upon and accepted by S., against the shipments. The plaintiff authorized the defendants, on the nonpayment of the bills, to realise the goods, and held himself responsible for any deficiency. Two of these bills were duly paid; but other two having been dishonoured, the defendants (at Monte Video) proposed to realise the goods at once, whereupon the plaintiff gave them a cheque for 2500*l.* accompanied by a letter requesting them not to sell, and authorizing them to hold the 2500*l.* as collateral security for S.'s acceptance to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonoured by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold and the bills were delivered up to S. cancelled, without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the 2500*l.*, to pay all the bills. In an action by the plaintiff against the defendants to recover back the 2500*l.*:—

Held, affirming the judgment of the Common Pleas Division, that the plaintiff was the principal in the transaction, and as the bills had been dishonoured and there was a deficiency after realising the goods, it was immaterial that S. had been discharged from liability upon the bills, and the defendants were not bound to refund the 2500*l.*

APPEAL from the judgment of the Common Pleas Division in favour of the defendants on a special case (1).

Petheram, for the plaintiff, contended that the effect of the cancellation of the bills was to discharge both the plaintiff and Santayana from all liability on the bills, and to deprive the plaintiff, as the drawer, of all remedy upon them against Santayana, the acceptor: *Webb* v. *Hewitt* (2); and as the plaintiff was only a surety and Santayana the principal debtor, the plaintiff was entitled to recover back the 2500*l.*

Cohen, *Q.C.*, and *Edwyn Jones*, for the defendants, contended that the plaintiff was the principal in the transaction; that as the bills had been dishonoured, and after the goods had been realised

(1) Ante, p. 60. (2) 3 K. & J. 438.

there was a deficiency, the defendants were entitled to retain the 2500*l.*: *Peacock* v. *Pursell* (1).

BRAMWELL, L.J. I think that the judgment of the Common Pleas Division is right, and ought to be affirmed.

The plaintiff, in acknowledging the defendant's letter of the 25th of November, writes: "In the event of non-payment of such drafts, we authorize you to realise the goods represented by the documents attached, and hold ourselves responsible for any deficiency that may arise." Under that arrangement, if the goods were sold and there was a deficiency, the plaintiff bound himself to make good the amount of the deficiency: but the defendants were to have no right to sell unless the bills were dishonoured. I think whatever words are used in the second letter the meaning is the same. They write: "We beg to hand you herewith a cheque for 2500*l.*, which please encash and hold the amount as collateral security for the above six bills on Mr. Santayana, but when they are paid with charges, you will of course refund us the 2500*l.*" I think the meaning of this letter is, whereas we have undertaken to be responsible for any deficiency we pay down 2500*l.* for the purpose of meeting that deficiency. Suppose the bills were never paid, but the goods realised more than the bills; it is clear that the whole 2500*l.* must have been returned to the plaintiff.

The way in which it has been put on behalf of the defendants, is this: the primary debtor is the plaintiff; but it is said for the plaintiff, as Santayana accepted the bill of exchange he became the primary debtor and the plaintiff the surety: but the latter is not the true view of the case. When Santayana accepted the bill no cause of action could arise against him until the bill was dishonoured, and then it would; and no claim would arise against the plaintiff until there was a deficiency in the sale of the goods. But when Santayana dishonoured the bill, this state of things came into existence, viz., that the plaintiff was liable for any deficiency that might arise, he having, on account of the advance made by the defendants, given them the 2500*l.* Why, by discharging Santayana on the bill, do the defendants lose their right

(1) 14 C. B. (N.S.) 728; 32 L. J. (C.P.) 266.

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YGLESIAS v. RIVER PLATE BANK.

against the plaintiff? They may lose their right against the plaintiff on the bill, but they do not lose the right to go against the plaintiff for any deficiency, or become liable to return the 2500*l.* which has been given by the plaintiff, there being a deficiency upon the sale of the goods greater than the sum for which the plaintiff held himself responsible. It is manifest, if we look at the documents, the intention was that the plaintiff should do his best to lessen the loss that might arise from Santayana's default in dishonouring the bills.

There is no doubt that the arrangement made was the most advantageous that could be made: a bonâ fide compromise was effected. It is not suggested that it operated to the prejudice of the plaintiff. The plaintiff had assented to the arrangement made by Santayana. What is there to get rid of the obligation to make good the deficiency? I can see nothing. Mr. Petheram's argument is this,—the 2500*l.* is to be taken as security for payment of the bills; if the bills are paid they must have returned it; if the defendants were to return it when the bills were paid, it follows it must be returned if they release the acceptor of the bills. The case, he contended, is the same as if the plaintiff had given a bond for the payment of the bills, and Mr. Petheram argued that, as soon as the position of the principal debtor is altered, the surety is released; therefore the 2500*l.* ought to be returned. Upon a proper interpretation of these documents, this is not the position of the parties. The agreement between the defendants and Santayana was assented to by the plaintiff, and the plaintiff must be taken to have agreed to that being done which the law of the country required should be done; therefore, he being a primary debtor is liable for the sum which he agreed to make good.

BRETT and COTTON, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Nicol, Son, & Jones.*
Solicitors for defendants: *Mackrell & Co.*

MEYERHOFF AND ANOTHER *v.* FROEHLICH.

1878
Feb. 15.

Statute of Limitations—Promise to revive a Debt under 9 *Geo.* 4, *c.* 14, *s.* 1—*Conditional Promise.*

In May, 1874, the defendant, in answer to a demand of a debt incurred by him in 1865, wrote to the plaintiffs as follows,—"Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." It was admitted that in one year since 1874 the defendant's income had been 14*l.* more than it was and since had been:—

Held, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and there was no affirmative proof of the substantial fulfilment of the condition.

STATEMENT OF CLAIM. 1. The plaintiffs are merchants at Aix-la-Chapelle, in Germany, and the defendant lives in Manchester.

2. Previously to the year 1865, the plaintiffs had lent the defendant divers large sums of money, and on the 30th of June, 1865, there was a balance including interest due from the defendant to the plaintiffs of 7218 German thalers 23 silbergroschen.

3. The defendant admitted the amount to be correct, and promised to pay it.

4. Since the 30th of June, 1865, the defendant has paid to the plaintiffs 1510 thalers 7 silbergroschen on account of the said debt and interest, the last payment having been made on the 13th of January, 1870.

5. The following correspondence has passed between the plaintiffs and the defendant:—

Aachen, May 23rd, 1874.

Mr. R. Froehlich, Manchester,—

We are now such a long time without hearing from you and without the promised instalment that we are compelled to summon you to begin as quick as possible with your payments, as we should otherwise be obliged to cause you unpleasant consequences.

Meyerhoff & Jos. Salomon.

Manchester, 29th May, 1874.

My dear Mr. Salomon,—

Your letter arrived during my absence from Manchester. I am not surprised at your being vexed that I did not yet continue my instalments and so prove you my good will. But, what can I do if I don't possess the necessary means to do so; and that is really the case. You will find it inconceivable, but it is never-

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theless true. I am nothing more than properly said a single paid clerk, in a responsible and important position its true, but badly paid; and, even after several years staying at H. & W.'s, there is not to be reckoned upon any important amelioration. And, why then do I not give up such a situation? Because I could not yet find another suitable one. As to salary, I am not better remunerated to-day than I was three, four years ago; and, if I could then send you something, it was simply because I was travelling nearly the whole year on the firm's expenses, while now it is just the reverse, for I am nearly the whole year at home spending on the most economic manner my wages, the small amount of which I am ashamed to name. It is true, since a few years I have a right to a small tantreme, i.e. in theory, but not in reality, because of the net profit which I partake in a small degree being absorbed by losses which I deserved neither in a direct or indirect manner, but which nevertheless count to my prejudice. After more or less time it will I hope and trust change, because the position I am in presently does not allow me even to give anything to my family. Fortunately, through their working successfully, their maintenance does not depend upon me. Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments.

Robert Froehlich.

Aachen, July 4th, 1876.

Mr. Robert Froehlich, Manchester,—

Not having yet made any arrangements for the instalments of what you owe us, and what you call yourself a debt of honour, we again request you to begin with them immediately. We should much regret if you would cause to yourself some unpleasantness.

Meyerhoff & Jos. Salomon.

Aachen, July 19th, 1876.

Mr. Robert Froehlich, Manchester,—

Without your reply to our letter of the 4th instant, we request you by the present to begin without delay with the payments on account, in order that we shall not be compelled to cause you some unpleasantness.

Meyerhoff & Jos. Salomon.

Manchester, July 28th, 1876.

Messrs. Meyerhoff & Jos. Salomon, Aix-la-Chapelle,—

Your favour of the 19th was handed me over at my returning here. You refer to your favour of the 4th, which if sent me after has missed reaching me. On the evening of the 24th of March last at Aachen I exposed to your Mr. Meyerhoff my position, which since little bettered.

R. Froehlich.

Aachen, July 31st, 1876.

Mr. R. Froehlich, Manchester,—

Yours of the 28th instant is to hand. We cannot be satisfied with the short explanation you give us therein. At you last being here you told our Mr. Meyerhoff that you hoped soon being able to begin with the payments. We request you most urgently to make true that utterance, being otherwise compelled to cause you inconvenience.

Meyerhoff & Jos. Salomon.

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Aachen, August 8th, 1876.

Mr. Robert Froehlich, Manchester,—

We are still without your reply to our letter of the 31st last month. We declare you herewith that we shall let us no more any longer divert, and request you to tell us whether you think or not to settle the affair in question, in order that we may take steps in consequence.

Meyerhoff & Jos. Salomon.

Aachen, September 9th, 1876.

Mr. R. Froehlich, Manchester,

As you did not reply to our sundry letters, we beg to inform you that, if you should not prefer an amicable arrangement with us, we shall send your firm your letter of August 11th, 1855, with the acknowledgment of the debt and the assurance given to us therein that, in consideration of our indulgence, you would answer our claims, and that we shall ask for its interference.

Meyerhoff & Jos. Salomon.

Manchester, September 15th, 1876.

Messrs. Meyerhoff & Jos. Salomon, Aachan,—

I beg to acknowledge the receipt of your favour of the 9th instant, which I omitted doing respecting your anterior letters because my answers would necessarily have only been a repetition of my former statements, which are founded upon facts, and which would have been as unsatisfactory for me to make as for you to receive. My considerations for you are unchanged; and, if I cannot prove them practically, the reason of it is that I spent seven, eight valuable years with vain hopes and promises. Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living.

With full of esteem, I subscribe myself Robert Froehlich.

6. The plaintiffs rely on the said correspondence to take the case out of the Statute of Limitations.

7. The plaintiffs will also, if necessary, contend that, if the promises in the defendant's letters are conditional, the conditions have been fulfilled.

The plaintiffs claim on a balance of principal and interest the amount of English money equivalent to 9897 thalers 18½ silbergroschen, no part of which has been paid by the defendant.

Statement of defence. 1. In the year 1864, the defendant was carrying on business in America as a merchant and shipper and exporter of produce, and whilst so carrying on business it was agreed between him and the plaintiffs that purchases of produce and oil should be made by the defendant in America on the joint account and risk of the plaintiffs and defendant.

2. In pursuance of that agreement, and not otherwise, the

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plaintiffs from time to time did previous to the year 1865 make remittances of money to the defendant for the purpose of purchasing as aforesaid on the joint account of himself and the plaintiffs, and that such remittances were duly applied by him for the purposes for which he received them.

3. The accounts relating to these joint purchases and of the outturn thereof have not been made up or rendered; and it is not the fact, as alleged, that, on the 30th of June, 1865, there was a balance (including interest) due from the defendant to the plaintiffs of 7218 thalers 23 silbergroschen. Neither is it the fact that the defendant has admitted such sum to be due or the account to be correct; nor has the defendant promised to pay it.

4. The plaintiffs did not either previously to the year 1865 or at any other time lend the defendant divers large or any other sums of money; and the defendant says that he did not pay to the plaintiffs the sum of 1510 thalers 7 silbergroschen on account of the sum of 7218 thalers 23 silbergroschen, but that such payment was made by him in satisfaction and discharge of moneys advanced by the plaintiffs for the private and family expenses of the defendant, and that the plaintiff received such moneys from the defendant for such purposes, and not for any other purpose; and the defendant says that he has repaid the plaintiffs for all moneys advanced or paid by them to or for his use.

5. The plaintiffs' claim in this action is barred by the Statute of Limitations.

6. The defendant does not admit the alleged correspondence referred to in the fifth paragraph of the statement of claim, and contends that the alleged correspondence does not take the plaintiffs' claim in this action out of the Statute of Limitations; and he says that no promises contained in the alleged correspondence have been fulfilled. Issue.

Upon motion for judgment before Denman, J., on the 15th of February, 1878, it was admitted that at the date of the letter of the 9th of May, 1874, the defendant was receiving at the rate of 200*l.* per annum for commission; and that subsequently to 1874, he had received 214*l.* in one year. It was also admitted that, on the 11th of August, 1867, there was due to the plaintiffs 7218 thalers 23 silbergroschen, on a current account at interest, and

that payments were made, and a balance was due as in the indorsement on the writ.

C. Russell, Q.C., and *Crompton*, for the plaintiffs. The acknowledgment to take a case out of the Statute of Limitations, need not amount to a direct promise to pay: it is enough if a promise can be inferred from the letter: *Collis* v. *Stack* (1); *Lee* v. *Wilmot* (2); *Chasemore* v. *Turner*. (3) In *Collis* v. *Stack* (1), Pollock, C.B., says: "The letter contains a distinct acknowledgment, with a promise to pay. No particular form of words is required to constitute a promise. 'All will be right' must be understood by everybody to mean 'you will be paid.'" The letter of the 29th of May, 1874, contains an absolute and unqualified admission that the debt is due,—at least as absolute as that in *Skeet* v. *Lindsay*. (4) In giving judgment in that case, Cleasby, B., quotes the language of Mellish, L.J., in *Re River Steamer Co., Mitchell's Claim*: (5) "There must be one of these three things to take the case out of the statute,—either there must be an acknowledgment of the debt from which a promise to pay is to be implied,—or, secondly, there must be an unconditional promise to pay the debt,—or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Assuming this to be a conditional promise, to pay when the defendant's circumstances became "somewhat better," there was evidence by the admission that that condition was fulfilled.

Hopwood, Q.C., for the defendant. The letters relied on contain no such acknowledgment as to warrant the inference of a promise to pay the debt.

DENMAN, J. Regard being had to the statement of claim, and the admissions agreed to at the trial, I think there can be no doubt that I ought to give judgment for the defendant. The passage in the letter of the 29th of May, 1874, which is mainly relied on, is as follows,—"Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." Now, *Chasemore* v. *Turner* (3)

(1) 1 H. & N. 605; 26 L. J. (Ex.) 138.
(2) Law Rep. 1 Ex. 364.
(3) Law Rep. 10 Q. B. 500.
(4) 2 Ex. D. 314.
(5) Law Rep. 6 Ch. at p. 828.

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is a distinct authority to shew that a mere reference to "obligations" will not do; but that there must be such an acknowlegment of a debt as that a promise, absolute or conditional, to pay may be inferred. Even assuming that there is anything in the language of that letter from which a promise to pay could be implied, it is clearly only a conditional one, "as soon as my position becomes somewhat better,"—as soon as a future uncertain event shall take place. Then, look at the facts proved and admitted, to see if there has been any affirmative proof that the condition has happened. It seems that during one year the defendant's position was bettered to the extent of 14*l*. In one sense, no doubt, the man's position was bettered: but that is hardly evidence that would warrant a jury in finding that the defendant's position had been substantially bettered so as to satisfy the condition. After all, it is a vague and loose expression; and, looking at the rest of the correspondence between the parties, it can hardly be said that the defendant was in a better position at the time the action was brought than he was in when he wrote that letter. In his letter of the 15th of September, 1876, the defendant writes,—"Since the present year I find myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living." Upon the whole, I see nothing which ought to be left to a jury as affirmative evidence that the condition of the defendant had become so really and substantially bettered as to satisfy the condition upon which his liability to pay the debt was to revive. It is not necessary, however, to go so far. Being in the position of a jury, to draw inferences of fact, the inference I draw is that there is nothing in the facts which appeared before me from which I could affirmatively say that the defendant is in a better position than he was in on the 29th of May, 1874. I therefore give judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Pritchard, Englefield, & Co., for Edwin Storer, Manchester.*

Solicitors for defendant: *Chester & Co., for John Farrington, Manchester.*

SAXBY *v.* EASTERBROOK AND HANNAFORD.

1878
March 25.

Libel injurious to Plaintiff in his Trade—Injunction to restrain future Publication—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

The Court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous.

Semble, that this power may be exercised by the judge who tries the cause.

Prudential Assurance Co. v. *Knott* (10 Ch. 142), and *Thorley's Cattle Food Co.* v. *Massam* (6 Ch. D. 582), considered.

STATEMENT OF CLAIM. 1. The plaintiff, at the times of the committing by the defendants of the acts hereafter complained of, was and still is one of a firm of engineers and makers of railway point and signal locking apparatus carrying on that business at Kilburn, under the name of Saxby & Farmer.

2. The defendants carried on and still carry on the business of railway point and signal apparatus makers.

3. Before the committing by the defendants of the said acts, the plaintiff had, on the 26th of March, 1867, presented to the Queen a petition shewing that he was in possession of an invention therein mentioned, and which invention he believed to be of great public utility, and stating that he was the true and first inventor thereof, and that the same was not in use by any other person or persons to the best of his knowledge and belief; and by the said petition the plaintiff prayed that Her Majesty would be pleased to grant unto him Her royal letters-patent, &c., for making and vending the said invention for the term of fourteen years, &c.

4. The said petition was accompanied by a statutory declaration made by the plaintiff, stating that he was in possession of the said invention, which he believed would be of great public utility, that he was the true and first inventor, and that the same was not in use by any other person or persons to the best of his knowledge and belief.

5. Her Majesty the Queen had by Her solicitor-general refused the application of the plaintiff, but without prejudice to his filing a subsequent application for Her Majesty's grant to him of Her

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royal letters-patent for that which was described in his provisional specification already filed in support of the matter of the petition.

6. The defendants on the 19th of July, 1876, falsely and maliciously printed and published a libel of and concerning the plaintiff, and of and concerning the said petition and the refusal to grant the application, containing the words and libellous matter following, that is to say, "Locking the catch-rod (meaning the invention referred to in the said petition), Easterbrook's grant dated 13th September, 1867 (meaning a grant by Her Majesty to Walter Easterbrook, one of the defendants, for letters-patent of the sole privilege to make, use, exercise, and vend a certain invention for a period of fourteen years, pursuant to the statutes in that case made and provided). Saxby's application (meaning the plaintiff's said petition and application to Her Majesty) cancelled by the Crown on ground of piracy from Easterbrook (meaning that the plaintiff had dishonestly and improperly presented the said petition, well knowing that he was not the true and first inventor of the said invention, and that he had dishonestly and improperly pirated the same from an invention by W. Easterbrook). Locking before the lever is moved, Easterbrook's grant dated the 24th September, 1867, Saxby's dated 24th December, 1867. Locking by the slotted link (rocker, &c.), Easterbrook's patents dated 15th February, 1868, and 27th May, 1872. Saxby's (meaning the plaintiff's) dated 23rd January, 1874." "Recent judgments of Lord Chancellors Hatherley and Selborne supporting Messrs. Easterbrook's claim. The person who first procures the Great Seal to be affixed to his letters-patent holds it against the world. The Crown could not grant a second patent, in derogation of one already granted, although the holder of such first patent might have been second in date of application. When a patent has actually been sealed, the Crown will not afterwards enter into the question whether or not some one else who had previously applied was a prior inventor, and would in no case give a subsequent grant for the same thing for which a patent had already been granted before. The principle of the decision plainly is, that what the Crown has actually granted cannot, if vested in the grantee, be taken away from him and given to somebody else."

The plaintiff claimed 1000*l*. He also claimed an injunction

to be granted to restrain the defendants from publishing libels against the plaintiff and repetitions of acts of the like nature and description as those above stated.

DEFENCE. 1. The defendants, as to par. 6 of the claim, deny the publication therein alleged of the several matters therein stated, and the meaning thereof respectively therein alleged.

There were various other allegations of defence, which in the result became immaterial.

At the trial before Lord Coleridge, C.J., it appeared that the defendants carried on business in partnership as engineers and railway signal manufacturers, and that some rivalry existed between them and the plaintiff who carried on a similar business, and that the libels complained of in the 6th paragraph of the statement of claim were published by the defendant Hannaford. The defendant Easterbrook, who disclaimed all knowledge of the publication, was discharged.

The jury found that the publications in question were libellous, and a verdict was taken against Hannaford for 40*s.*, with costs, and the learned judge ordered that a perpetual injunction should issue to restrain him from publishing libels of the nature complained of against the plaintiff. A doubt, however, having been suggested as to the power of the judge at nisi prius to order an injunction to issue,

March 25. *Aston, Q.C.* (*Macrory* with him), pursuant to notice, moved, "that a writ of perpetual injunction do issue to restrain the defendant Hannaford from publishing libels against the plaintiff of those or the like nature complained of, either in his own name or in the name of his firm, with costs." It was laid down by Lord Cairns, C., in *Prudential Assurance Co.* v. *Knott* (1), that the Court of Chancery has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property. But, in a subsequent case,—*Thorley's Cattle Food Co.* v. *Massam* (2),—Malins, V.C., upon a motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the plaintiffs' trade, held that, notwithstanding

(1) Law Rep. 10 Ch. 142. (2) 6 Ch. D. 582.

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the decision in *Prudential Assurance Co.* v. *Knott* (1), the Court had since the Judicature Act, 1873, s. 25, sub-s. 8 (2), power to restrain the publication of such an advertisement.

[LINDLEY, J. I am under the impression that the Master of the Rolls refused to follow that.]

The cases of *Dixon* v. *Holden* (3) and *Springhead Spinning Co.* v. *Riley* (4) fully support the view taken by Malins, V.C.

Macrae Moir, contrà.

LORD COLERIDGE, C.J. I am of opinion that Mr. Aston is entitled to the order which he prays. This is an action for a libel, in which the plaintiff claims damages and an injunction to restrain the defendants from publishing libels against the plaintiff and repetitions of acts of the like nature and description as those described in the statement of claim, to the injury of his business. An order to that effect was made by me at the trial. But, inasmuch as it seemed to be doubtful whether, upon the cases in Equity, such an injunction could be granted for the purpose of restraining the publication of a libel, it has been judged right to make the application to the Court. Such cases there are; and they seem to me to have proceeded upon a perfectly good ground, but one which is distinguishable in principle from the case now before us. Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury; and I can well understand a Court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous. Here, however, the jury have found the matter complained of to be libellous,

(1) Law Rep. 10 Ch. 142.

(2) Sub-s. 8 provides that "a mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just: and, if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable."

(3) Law Rep. 7 Eq. 488.

(4) Law Rep. 6 Eq. 551.

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and it is connected with the property of the plaintiff, and calculated to do material injury to it. It is that which is sought to be restrained; and upon principle it appears to me to be a proper thing to do. My Brother Lindley, who is more conversant with these matters than I am, informs me that all the cases where the Courts of Equity have refused to interfere were cases where the application was made before verdict. Here, the jury have found the publications to be libellous; and they are eminently calculated to injure the plaintiff's property in the patent-rights which are assailed. I am unable to see any reason why the injunction prayed should not be granted: certainly the cases cited do not supply that reason. If the cases do not help us, they are not in the way: all but one of them seem to have been confined to interlocutory orders, and in that one it was sought to restrain the continuance of waste or trespass. As to sub-s. 8 of s. 25 of the Judicature Act, 1873, I must confess I do not appreciate its application to the matter.

LINDLEY, J. I am of the same opinion. I am not aware of any case in Equity which is precisely in point. The principle upon which the Courts of Equity have acted in declining to restrain the publication of matter alleged to be libellous, is, that the question of libel or no libel is pre-eminently for a jury. But, when a jury have *found* the matter complained of to be libellous and that it affects property, I see no principle by which the Court ought to be precluded from saying that the repetition of the libel shall be restrained. The only reason I can suggest for not granting it clearly does not exist here: and I think it would be much to be regretted if we felt ourselves compelled to refuse the order. It is, however, hardly a case for costs.

Order absolute.

Solicitors for plaintiff: *Faithful & Co.*
Solicitor for defendant Hannaford: *R. T. Timmins.*

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June 26.

JONES *v.* ROBINSON.

Will—Bequest of "Personal Estate, Property, Chattels and Effects"—"Seised"—Construction—Intestacy as to Real Estate.

A will by which the testator said, "I give and bequeath unto my wife my household goods" (and personalty of various kinds particularly specified), continued, "and all other my personal estate *property* chattels and effects whatsoever and wheresoever to which I am now *seised* possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife, her executors, administrators and assigns for her and their own use and benefit absolutely." Then followed a formal "devise" of real estate vested in him by way of mortgage in fee, and also of his trust estates to his wife and brother their "heirs and assigns" upon the trusts affecting the same estates respectively:—

Held, that the word "personal" controlled the subsequent general words of the gift to the wife, and that real estates of which the testator died seised as absolute owner did not pass by the will.

Special Case.

John Jones duly made and executed his last will, dated the 28th day of September, 1849, and such will was (so far as is material for the present case) in the words following, that is to say:—"I appoint my wife Mary Jones and my brother Thomas Jones of Blackthorn in the county of Oxford farmer executrix and executor of this my last will and testament. I direct that all just debts funeral expenses and the charges of proving this my will may be fully paid and satisfied and after payment and satisfaction thereof I give and bequeath unto my wife Mary Jones all my household goods and furniture and implements of household farming stock cattle growing crops and other my effects in and about the house and upon the farm and lands in my occupation at Stratton Audley aforesaid and also all my ready money and money out at interest and securities for money mortgages bonds bills book debts and all other my personal estate property chattels and effects whatsoever and wheresoever to which I am now seised possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife Mary Jones her executors administrators and assigns for her and their own use and benefit absolutely and I do hereby devise all such

real estates as are now vested in me by way of mortgage in fee unto and to the use of the said Mary Jones and Thomas Jones their heirs and assigns subject to such equity of redemption as may affect the same estates respectively at the time of my decease but the money secured on such mortgages shall be considered as part of my personal estate. I also devise to the said Mary Jones and Thomas Jones all such estates as are now vested in me upon any trust or trusts to hold the same estates unto and to the use of the said Mary Jones and Thomas Jones their heirs and assigns upon the trusts affecting the same estates respectively."

The testator was at the time of his death seized for an estate of inheritance to him and his heirs, according to the custom of the manor of the prebend of Buckingham with Gawcott, in the county of Buckingham, of certain hereditaments therein situate.

He died on the 9th day of May, 1866, without having revoked or altered his will, which was duly proved by the said Mary Jones and Thomas Jones.

Upon the death of the testator his widow, Mary Jones, entered into possession of the said hereditaments, and continued in uninterrupted possession thereof up to the time of her death.

She died on the 24th day of December, 1871, having by her will, dated the 23rd day of February, 1867, devised all her real estate unto trustees upon trust for sale.

Subject only to the question hereby submitted for the opinion of the Court, the defendant was a bonâ fide purchaser from the trustees of the will of Mary Jones of the said hereditaments for valuable consideration.

The defendant, as such purchaser as aforesaid, entered into possession of the said hereditaments on the 25th day of March, 1872, and had ever since continued in uninterrupted possession thereof.

The heir of the testator, John Jones, according to the custom of the said manor, was his nephew John Jones, junior, who died on the 21st day of November, 1868, intestate, leaving his eldest son, the plaintiff, his heir according to the custom of the said manor.

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The question submitted for the opinion of the Court was, Whether, according to the true construction of the said will of the said testator, the said hereditaments were thereby effectually devised to the said Mary Jones, or whether he (the said testator) died intestate in respect thereof?

May 9. *Fawcett*, for the plaintiff. Freeholds may, no doubt, pass under the word "property" in a will. But here that word is inserted amongst others, shewing it to mean personal property only.

THE COURT called on

Pauli, for the defendant. The adjective personal is attached to the noun "estate" only, and does not apply to "property." All other property "whatsoever" of which the testator was "seized" is expressly given. "Property" will include real estate, and "seised" is a word applicable solely to real estate. Suppose the word "manors" followed "personal property," it certainly could not have been governed by "personal," and manors would have passed under the will. Then why, because the word property has a general signification, including personal as well as real estate, should it be restricted to personal estate and the word "seised" be disregarded? Many cases are cited in 1 Jarman on Wills, 3rd. ed. "which seem," says the author, at p. 683, "fully to sustain the position that to warrant confining of the word 'estate,' and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them; for where this indication has been wanting, or has been less clear" than in some authorities previously mentioned, "the words have been held to be used in their proper, i.e. their unrestricted sense;" and at p. 693 the cases are said "to demonstrate the inclination of the Courts at the present day to hold lands to pass under words per se capable of comprehending them, notwithstanding their association with terms applicable to personalty only." In *Evans* v. *Jones* (1) a bequest which certainly seemed limited to personal estate was held to pass realty.

The onus of shewing that real estate does not pass under

(1) 46 L. J. (Ex.) 280.

general words in a will is now shifted on to those who assert an intestacy.

[He referred also to *Hughes* v. *Pritchard* (1); *Belaney* v. *Belaney* (2).]

Fawcett replied.

Cur. adv. vult.

June 26. The judgment of the Court (Lopes and Denman, JJ.) was delivered by

LOPES, J. The facts are clearly and concisely stated in the special case, and the material part of the will is as follows.

[His Lordship read it from the special case.]

The only question is whether the real estate of the testator passed under these words to his widow, so as to be vested in the defendant, a bonâ fide purchaser from her, or whether it has passed to the plaintiff, the eldest son of the heir-at-law of the testator, as upon an intestacy. The testator having carefully enumerated many kinds of personal property, proceeds thus: "and all other my personal estate property chattels and effects whatsoever and wheresoever to which I am now seised possessed or entitled to or may hereafter acquire or can hereby dispose of to hold the same unto my said wife Mary Jones her executors administrators and assigns for her and their own use and benefit absolutely." Most of the expressions used are applicable, it is to be observed, exclusively to personalty, indeed the only word technically applicable to realty is "seised."

In determining the construction to be put upon a will every reasonable intendment should be made against an intestacy. It is, however, a canon of construction that the words are to be taken to be used in their proper meaning unless something is found in the will to shew the testator intended to use them in a different sense. Wills are not frequently expressed in the same language, and it is, therefore, difficult to find any authority precisely in point. The case of *Belaney* v. *Belaney* (2) is very similar, and the judgment of Lord Chelmsford seems to cover this case. The words of the will in that case, so far as material, were as follows: "I hereby give and bequeath to my said wife the whole of my personal property, estate, and effects of every and whatsoever kind they may

(1) 6 Ch. D. 24. (2) Law Rep. 2 Ch. 138.

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be, for her sole use and benefit." It was held that these words were not sufficient to pass the real estate, and Lord Chelmsford said, "If the words of this will are read according to their ordinary sense and construction the word personal overrides all the subsequent words, property, estate, and effects. It has been urged that the will is to be read as if there was a comma after the word property, and that the effect of the word personal is exhausted upon the word property, and extends no farther. I am, however, bound to ascertain the meaning of the testator from his words, and I cannot doubt that 'personal' extends to these subsequent words as well as to property. The cases cited for the appellant were only cases where the word estate was held not to be qualified by being associated with words relating only to personalty, and have no bearing upon a case where the word estate is overridden by the word personal. I might guess that it was the testator's intention that all his interest in this property should go in the same direction, but that would be mere conjecture, and I should have to strike out the word personal in order to give the will such a construction." Adopting the reasoning in the above case we think in this case that the word personal overrides the word "estate," and extends to the subsequent words "property," "chattels," and "effects," and that the mere introduction of the word "seised," in the passage "to which I am now seised, possessed, or entitled to," is not sufficient reason for holding otherwise. The case of *Evans* v. *Jones* (1) is distinguishable from the case now before us. The words there were "first, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever and of what nature and kind soever, or whatever I may be possessed of at my decease, to and for her sole use and benefit." It was held in that case that the latter words need not be read as part of one clause containing general words following a particular enumeration, but that they might be read as introducing a new subject by the word "or." On this ground it was held that the real property passed. There are no such comprehensive words here, and there is nothing to disconnect the subsequent general words from the governing word "personal," which precedes them.

(1) 46 L. J. (Ex.) 280.

A case of *Smyth* v. *Smyth* has been recently before Vice-Chancellor Malins, and is reported in the Weekly Notes of June the 22nd last, where it was held that real estate passed under the words "All the rest, residue, and all other his effects" in the following gift in a will, "And lastly, I give my sheep, and all the rest, residue, moneys, chattels, and all other my effects to be equally divided among my four brothers, whom I hereby constitute and appoint to be sole executors of this my last will and testament." (1) It is to be observed that there is no general and qualifying word like "personal," and the case is distinguishable from the present on this ground. In the present case it is to be observed that the testator appears to have understood the distinction between real and personal estate, and the distinction between the appropriate words for disposing of them respectively. At a later part of the will, when he proceeds to deal with the estates vested in him by way of mortgage in fee, he uses apt language, and while he devises them to Mary Jones and Thomas Jones, their heirs and assigns, he directs that the money secured is to form part of his personal estate. The testator also uses apt and appropriate language when he disposes of his trust estates.

We think the words relied upon are insufficient to pass real estate, and that the plaintiff is entitled to judgment with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Lovell, Son, & Pitfield.*
Solicitors for defendant: *Risley & Stoker.*

(1) Since reported, 8 Ch. D. 561.

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[IN THE COURT OF APPEAL.]

KIPLING, PUBLIC OFFICER OF THE DARLINGTON JOINT STOCK BANKING COMPANY, *v.* TODD.

THE SAME *v.* ALLAN.

Company—Scire Facias—Companies Clauses Consolidation Act, 1845 (18 *Vict.* c. 16), s. 36—*Director named in Special Act—Resignation of Directorship—Implied Surrender of Inchoate Right to take Shares and Implied Acceptance of such Surrender.*

A railway company was incorporated by a special Act passed in June, 1866, in which T. and A. were nominated directors, until the first ordinary meeting of the company, and which provided also that the qualification of a director should be the possession of fifty shares. In August, 1866, T. sent in his resignation as director, and S. was informally appointed director in his stead, and thenceforward continued to act as such. T. took no part in the affairs of the company, never applied for any shares, none were allotted to him, and although calls were made, no notice thereof was given to him. A. acted as director until December, 1867, when he also resigned his directorship; shortly afterwards B., who had not previously acted as a director, and whose name was not in the special Act, attended the meetings of the board as director. No shares were ever allotted to A. No first ordinary meeting of the company was ever held. After the resignations of T. and A. an informal register of shareholders was drawn up, from which it appeared that the whole number of shares constituting the capital of the company had been allotted to other persons than T. and A. After the resignations of T. and A. the railway company became indebted to the D. Banking Company. In February, 1876, the plaintiff as public officer obtained judgment against the railway company for 18,000*l.*, and in November issued execution against them; the execution being unsatisfied, he issued, in July, 1877, writs of scire facias upon the judgment against T. and A. as holders severally of fifty shares in the railway company:—

Held, that the writs of scire facias could not be maintained against T. and A., for it was to be inferred from the facts above stated that the railway company had accepted from T. and A. a surrender of the inchoate right to shares which they possessed under the special Act; that the evidence of an acceptance of the surrender of an inchoate right need not be as express as would be required in the case of the surrender of specific shares actually allotted; and that the lapse of years, during which the railway company had not treated T. and A. as shareholders, was strong evidence that they had abandoned all rights against them; and that, the plaintiff's causes of action having accrued since their resignations, T. and A. were not estopped as against him from denying their liability as shareholders; and that he could not be in a better position as regarded them than the railway company.

Portal v. *Emmens* (1 C. P. D. 201, 664) distinguished.

SCIRE FACIAS to recover against the defendants severally the sum of 500*l.*, founded upon a judgment obtained by the plaintiff, as the public officer of the Darlington District Joint Stock Bank, for

the sum of 18,322*l.* 8*s.* 3*d.* against the Merrybent and Darlington Railway Company, wherein the defendants were alleged to be severally the holders of fifty shares. The writs of scire facias were dated the 12th of July, 1877.

The actions were tried in Middlesex during the Hilary Sittings, 1878, before Lopes, J., without a jury. It is necessary to mention only the following facts. The Darlington District Joint Stock Banking Company had, since the 1st of October, 1869, advanced sums of money to the Merrybent and Darlington Railway Company; these sums not having been repaid, the plaintiff, as one of the registered public officers of the banking company, had, on the 1st of February, 1876, obtained judgment against the railway, execution was issued thereon, but was not satisfied, and thereupon the writs of scire facias above mentioned were issued. Each of the defendants was nominated a director by the Merrybent and Darlington Railway Act, 1866 (1). The defendant Allan had been

(1) The Merrybent and Darlington Railway Act, 1866 (29 Vict. c. lxxv.), s. 2, received the Royal Assent on the 11th of June, 1866, and incorporated the Companies Clauses Consolidation Act, 1845.

Section 4: Certain persons, including the defendants and Henry Currer Briggs, and Henry King Spark, "and all other persons and corporations, who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, administrators, successors, and assigns respectively, shall be united into a company for the purpose of making and maintaining the railway, and for other the purposes of this Act; and for those purposes shall be incorporated by the name of the Merrybent and Darlington Railway Company, and by that name shall be a body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands and other property for the purposes of this Act."

Section 13: "The first ordinary meeting of the company shall be held within three months after the passing of this Act."

Section 14: "The number of directors shall be seven; but it shall be lawful for the company from time to time to reduce the number, [provided that the number be not less than five."

Section 15: "The qualification of a director shall be the possession in his own right of not less than fifty shares."

Section 17: Seven persons, including the defendants and Henry Currer Briggs, "shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act; at that meeting the shareholders present, in person or by proxy, may either continue in office the directors appointed by this Act, or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this Act being, if qualified, eligible for re-election; and at the first ordinary meeting to be held in every year, after the first ordinary meeting, the s areholders present, in person or by

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chairman of the company, and continued to act as director until December, 1867, when he resigned. No shares were ever allotted to him, and he had never purported to transfer any. The defendant Todd resigned in August, 1866, shortly after the Act was passed, and never acted as director, nor were any shares allotted to him.

The other material facts, the course of the trials, and the arguments are sufficiently mentioned in the judgment of the Court.

June 19, 20. *W. G. Harrison, Q.C.*, and *English Harrison*, for the plaintiff.

Benjamin, Q.C., and *Candy*, for the defendant Todd.

Herschell, Q.C., *Lumley Smith*, and *Brook Little*, for the defendant Allan.

In addition to the authorities mentioned in the judgment the following cases were cited: As to the admissibility in evidence of the register of shareholders: *London and North Western Ry. Co.* v. *M'Michael* (1); as to the admissibility in evidence of the company's minute book: *Sheffield and Manchester Ry. Co.* v. *Woodcock* (2); as to the liability incurred by acting as director of a company: *Austin's Case* (3); *Harward's Case* (4): as to the liability incurred by being nominated a director in an Act of Parliament constituting a company: *Kincaid's Case* (5); *Forbes' Case.* (6)

Cur. adv. vult.

June 26. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.), was delivered by

THESIGER, L.J. The plaintiff in these actions is a judgment creditor of the Merrybent and Darlington Railway Company for

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proxy, shall (subject to the power hereinbefore contained for reducing the number of directors) elect persons to supply the places of the directors then retiring from office, agreeably to the provisions in the Companies Clauses Consolidation Act, 1845, contained, and the several persons elected at any such meeting, being neither removed, nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead in manner provided by the same Act."

(1) 5 Ex. 855; 20 L. J. (Ex.) 6.
(2) 7 M. & W. 574.
(3) Law Rep. 2 Eq. 435.
(4) Law Rep. 13 Eq. 30.
(5) Law Rep. 11 Eq. 192.
(6) Law Rep. 19 Eq. 353.

a sum exceeding 18,000*l.*, and seeks by means of the process of scire facias to obtain execution against each of the defendants to the amount of 500*l.*, as a holder of fifty shares in the company. The actions were tried before Lopes, J., without a jury, judgments were given by him for the plaintiff in each action, and against those judgments the present appeals are brought. The evidence upon which the learned judge acted consisted of statements made by counsel which were taken as admitted, the oral examination of the secretary of the company, a register of shareholders which was put in, subject to objections as to its admissibility and as to its validity; and a minute book, which was referred to in a general way, was handed to the learned judge for his perusal, and must, we think, be taken to have been made evidence, although it has been contended before us that only one or two minutes were actually referred to. In addition to the materials before the learned judge, we have had read to us, without objection on the part of the plaintiff, an affidavit sworn by the defendant Todd. It would have been more satisfactory to the Court if the evidence in the two cases had been taken in a somewhat more formal and precise manner, for considerable time has been occupied in the argument in this Court in deciding what was proved or admitted at the trial, there being a difference of opinion upon this point between the learned counsel engaged. The following facts, however, may be treated as established:

The Royal Assent was given to the Merrybent and Darlington Railway Act on the 11th of June, 1866. Prior to its passing, the defendant Todd, an owner of land in the neighbourhood of the line of the proposed railway, was asked by a person of the name of Boyer to join him and other persons in the prosecution of the railway scheme, and to become a shareholder in, and a director of, the company to be incorporated. At that time it was intended that the qualification of a director should be the possession of 100 shares of 10*l.* each. Todd at first assented to Boyer's request, and paid a deposit of 5*s.* a share, or 25*l.* in respect of the qualification shares, which it was then contemplated he would receive when the Act incorporating the company should pass. Subsequently, however, Todd appears to have come to the conclusion that as he was not himself a resident in the country in which the proposed

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railway was to be made, it would be better for him to have nothing to do with it, and he accordingly wrote to that effect to Boyer. In answer to his letter Boyer wrote informing him that his name was already in the bill, which had been lodged in Parliament, and that it would be inconvenient at the stage of the proceedings in Parliament which had then been reached to strike it out, and suggesting that he should allow his name to remain, and should after the passing of the Act resign his position in the company. Todd acquiesced in this suggestion, and the bill passed into law. By the 4th section nine persons, including the defendants Todd and Allan and a person of the name of Spark, were specifically named as constituting with all other persons who had already subscribed, or should thereafter subscribe to the undertaking, the company incorporated by the Act; and by the 17th section seven of the persons named, including Todd and Allan, but excluding Spark, were constituted the first directors of the company. The terms of that section are as follows:—[The Lord Justice read it.]

The Act having passed, Todd carried out the arrangement which he had made with Boyer, sent in his resignation as director, and on the 29th of August, 1866, a meeting of directors was held at which the board purported to accept the resignation and to appoint Spark director, in the stead of Todd, and on the same day an attempt was made to hold an ordinary meeting of the company, at which Spark would have been presumably elected by the company a director in accordance with the terms of s. 17 of the special Act, but which, as appears from the minute book, was adjourned in consequence of a quorum of shareholders not being present. Spark, however, thenceforward acted as a director. Todd took no part whatever in the affairs of the company, never applied for any shares in it to be allotted to him; no shares were allotted to him, and although it appears from the minute book that upon four occasions resolutions for calls were made by the directors, there is no evidence that notice of such calls or any of them was given to Todd; and as far as relates to any act done either by him or the directors of the company, or the company itself, Todd entirely ceased to have any connection with the company, and, for anything that appears in the evidence, never heard anything more of it until eleven years afterwards,

when the plaintiff issued his writ of scire facias against him. The case of Allan differs in this respect, that he at the time when the special Act passed, seems to have intended to take part in the affairs of the company, and did act as a director down to the month of December, 1867, when he also resigned his directorship. There is no entry in the minute book of any appointment of a director in his stead, but shortly after his ceasing to act, the name of A. Briggs, who had not previously acted as a director, and whose name is not in the special Act, appears in the minute book as one of the directors attending the board. As regards the subsequent history of the company, the evidence before us is of the most meagre character. Prior to 1869 no register of shareholders existed, and no allotment of shares had been made; but in August, 1869, a register of shareholders was in fact sealed, and such register was put in at the trial, subject to the objection already referred to, as to its admissibility in evidence, and also to the objection that, even if admitted in evidence, it could have no legal effect, being scaled at a meeting of the company at which there was no proper quorum. Upon this latter point Richardson, the secretary of the company, who was examined as a witness, proved that the only two persons present at the meeting in August, 1869, were Spark and a person of the name of Johnston, who was one of the directors of the company. Apart, however, from the evidence of the register, it was stated at the trial, on the part of Todd and Allan, and not disputed, that a mining and smelting company, called the Merrybent and Middleton Tyas Mining and Smelting Company, Limited, became the holders of 5650 shares out of the 6000 shares, which constituted the capital of the company, and Richardson proved that 54,000*l.* had been paid by the mining company, although in what way this amount was paid did not appear, and that with this exception no payment in respect of shares was made by anybody.

In this state of facts it was contended, on the part of the plaintiff, that both Todd and Allan, by virtue of this nomination as directors in the special Act of the company became shareholders of the company for the number of shares mentioned in the Act as the qualification of directors, that their liability as shareholders could only be got rid of by transfer of those shares in the manner

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provided by the Companies Clauses Consolidation Act, 1845, and that a transfer had not in fact in any manner been validly made, and that the writs of scire facias were properly issued against both the defendants. The defendants, on the other hand, while admitting that owing to their nomination as directors in the special Act they became shareholders of the company upon the passing of that Act, urged that the liability incurred was one different in kind to that which would have attached to them, if shares had been duly allotted to them, and contended that the resignations of their offices as directors took effect in law as well as in fact, and was acted on by the company, that the proper inference from the evidence was that the whole of the 6000 shares which constituted the capital of the company were held by persons other than themselves, and that under all the circumstances of the case their liability as shareholders had ceased. In support of the plaintiff's contention great reliance was placed upon the case of *Portal* v. *Emmens* (1), which being a decision of this court, is binding upon us, and which was alleged by the plaintiff's counsel to be decisive upon the question before us. It becomes necessary, therefore, to ascertain in the first instance what that case really decided.

We cannot agree with the argument of Mr. Benjamin that the ratio decidendi was limited to the narrow ground of an estoppel founded upon the special circumstances of the case, although the judgment of the Lord Chief Justice Cockburn (2), and the concluding passages of the judgment of the Master of the Rolls (3) lend some colour to the argument; but we read the judgment as deciding that where, by an Act of Parliament, persons' names are incorporated into a company having a share capital, and the same persons are also named as directors, while the holding of a certain number of shares is prescribed as a qualification for the office of directors, these legal consequences follow: First, Each corporator ex necessitate rei becomes a member of the company, and as such, and apart from the definition of shareholder given in s. 3 of the Companies Clauses Consolidation Act, 1845, must be considered as holding at least one share in the company; and each person

(1) 1 C. P. D. 201, 664. (2) 1 C. P. D. at p. 664.
(3) 1 C. P. D. at p. 668.

named as a director must be considered as holding at least the number of shares constituting the prescribed qualification: Secondly, Section 36 of the last-mentioned Act, under which the scire facias in this and similar cases is issued, authorizes its issue against any shareholder. Section 3 of the same Act defines "shareholder" as meaning "shareholder, proprietor, or member of the company," and consequently execution may issue against a person who by the special Act is constituted a director, a member of the company, and therefore a shareholder. The decision in *Portal* v. *Emmens* (1), though going to the length we have mentioned appears to us to go no farther, and the facts there proved shewed that the defendant on the one hand had done nothing for the purpose of getting rid of his position as director, with its consequent obligations, and on the other hand had done nothing towards satisfying the liability of the plaintiff, under which the company by its special Act itself had come. It is a long step from such a case to the present, where years after directors have resigned their offices, and other persons de facto acted in their stead, without any claim being made by the company to treat the original directors as shareholders, a creditor of the company whose claim against it only first arose long after their resignations, attempts to treat those original directors as still shareholders; and we are of opinion that such a claim cannot under the circumstances of this case be supported. In forming this opinion we purpose to assume in favour of the plaintiff: 1, that no valid election of directors in the place of Todd and Allan ever took place for the reason that such elections were, by the provisions of the special Act, to be made by the company and not by the board of directors, and no valid ordinary meeting of the company at which such election could be made, ever in fact took place; 2, that the register is not evidence against the plaintiff, although it might be evidence against the defendants, and would be evidence as between them and the company in actions for calls: see ss. 26, 27, and 28 of the Companies Clauses Consolidation Act, 1845; 3, that no register was ever duly authenticated by the company, there having been no meeting at which the company's seal was properly authorized to be affixed to it.

(1) 1 C. P. D. 201, 664.

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But, having assumed thus much in favour of the plaintiff, how stands the matter? No shares were in fact allotted to the defendants, therefore no shares could be transferred by them in the manner prescribed by ss. 14 and 15 of the General Act. This was admitted on the part of the plaintiff, and it was argued on his part that until an allotment of shares, and possibly until the formation of a register, it would be impossible for the defendants to get rid of their positions as shareholders. But we cannot concur in this view. The decision in *Portal* v. *Emmens* (1) requires us to imply that Todd and Allan were at one time shareholders, from the fact that they were named as corporators and directors in the special Act; but the reason of the thing would seem to require that it should be competent to persons in such a position, by bonâ fide arrangement between them and the company, to relinquish their position as corporators and directors, and to get rid of its consequent liabilities, provided no circumstances exisited which might constitute an estoppel in favour of a particular creditor; and if this be so, it would also seem to follow that the fact of such an arrangement may be established as against a creditor, who cannot set up an estoppel, in the same manner as it might be established between the same person and the company itself. Now, could we reasonably hold under the circumstances of this case and after such a lapse of years, that the company on the one hand could have claimed to treat either Todd or Allan as shareholders, or that Todd or Allan, if the company had been successful, could have enforced a claim to an allotment of the shares, which constituted the qualification for the position which they once held? As a matter of fact from the figures proved it has been not unreasonably argued that no shares could have been allotted to the defendants, for from the minutes of the meetings of the board of directors held after the resignation of Todd and Allan it appears that seven persons, that is to say, the maximum number allowed by s. 14 of the special Act, acted in the capacity of directors, and if each held the prescribed number of fifty shares, which upon the maxim "omnia præsumuntur rite esse acta" it might be supposed they did, and no transfers of shares being proved to have taken place, 350 shares would thereby

(1) 1 C. P. D. 201, 664.

be absorbed, and inasmuch as the mining company is proved to have held 5650 shares, the whole capital of the company would thus be allotted to persons other than the defendants. But be this how it may, we think it at all events a proper inference from the facts proved that the company accepted from Todd and Allan a surrender of the shares or the inchoate right to shares, which the defendants possessed under the special Act. Such a surrender might under s. 9 of the Companies Clauses Act, 1863, be accepted by a company on such terms as they think fit of any shares which have not been fully paid up. If a company may accept a surrender in the case of specific shares actually issued, it seems to follow that they may do so in the case of a mere right to have specific shares allotted, and that the evidence of an acceptance in the latter case need not be as express as would be required in the former case; for where shares have been issued and certificates given, it would be reasonable to expect that a surrender should be evidenced either by writing or by a delivery of the certificates to the company, but where there is nothing to deliver and only a right or liability to be enforced the mere non-enforcement of that right or liability for many years is in itself strong evidence of the right or liability having been abandoned.

It has been suggested that if under such circumstances as exist in the present case a director of a company named as such in the special Act were held to have become freed from the liability attaching to his position, then the whole body of the directors could by mere arrangement among themselves equally free themselves from liability, and creditors of the company might be left without any shareholder against whom they could enforce execution. But we think that the courts are strong enough to stop any unjust and collusive arrangements of the kind suggested, and that they have no analogy in kind or degree with the bonâ fide surrender, which we infer from the facts before us. The authorities, which have been cited in argument do not directly support the conclusion at which we have arrived, but they are in no way adverse to it. The *Cheltenham and Great Western Union Ry. Co.* v. *Daniel* (1), and *Scott* v. *Berkeley* (2), at least indicate that the courts in cases like the present will look to the substance of the

(1) 2 Q. B. 281. (2) 3 C. B. 925.

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transactions which are in question, and where persons, whose position as shareholders is a legal consequence of some other position held by them, relinquish that other position under circumstances which evidence an intention to cease to be a shareholder, acted upon by the company, will hold that such intention has been effectually carried out, even though forms, prescribed by Act of Parliament or adopted as the general mode of carrying out such transactions, have not been in the particular instance adhered to. The appeals must be allowed, and judgments entered for the defendants.

Judgments reversed.

Solicitors for plaintiff: *Clarkes, Rawlins, & Clarke, for Allison, Son, & Willan, Darlington.*

Solicitor for defendant Todd: *Adam Burn, for Steavenson & Meek, Darlington.*

Solicitor for defendant Allan: *R. T. Jarvis, for Hutchinson & Lucas, Darlington.*

June 28.

WILKINSON *v.* CALVERT.

Landlord and Tenant—Yearly Tenancy—Agreement for Six Months' Notice to quit—The Agricultural Holdings Act, 1875 (38 *&* 39 *Vict. c.* 92), *s.* 51—*Year's Notice.*

A yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that "Where a half year's notice, expiring with the year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same."

CLAIM. By deed, dated the 29th of May, 1868, Francis Hully demised to the defendant at the yearly rent of 55*l.* certain premises for and during the term of one year and so on from year to year, determinable at the end of the first or any subsequent year on six months' notice to quit from either party to the other party previous to the time of entry in any year, the said tenancy to commence as to the lands for all purposes on the 2nd of February then last past, and as to the messuages and buildings on the 12th of May then instant.

The defendant entered into possession of the premises under the lease.

On the 10th of April, 1877, Hully by deed conveyed to the plaintiff all his estate, interest, and reversion in the premises, subject to the lease.

On the 2nd of August, 1877, the plaintiff gave the defendant notice to quit the premises as to the lands on the 2nd of February then next, and as to the messuages and buildings on the 12th of May then next. The plaintiff demanded of the defendant possession of the premises according to the notice, but the defendant refused to deliver up the same.

The plaintiff claimed possession of the premises.

Demurrer.

Forbes, for the defendant. The notice given did not determine the tenancy. It was a six months' notice, which would no doubt have been sufficient prior to the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92.) But s. 51 now provides that where half a year's notice is "by law" necessary to determine a yearly tenancy a year's notice shall be necessary. Here the law, having regard to the agreement of the parties, required six months' notice, which is equivalent to a half year's notice, and s. 51 therefore operates to extend that period to a year. Sect. 56 enacts that the Act shall apply, unless the landlord and tenant agree in writing that it shall not. They have not so agreed, nor has either of them given notice under s. 57 of a desire that this contract of tenancy, which was existing on the 14th of February, 1876, when the Act came into operation, should remain unaffected by the Act. In *Hewitt* v. *Harris* (1), decided on the 18th of February last, Pollock, B., was of opinion that, but for a notice given under s. 57, the Act would have applied to a similar tenancy.

Anstie, for the plaintiff. The Act does not apply. First, this tenancy is not determinable by a half year's notice, but by six months' notice. A half year's notice is by law required to determine a yearly tenancy if the parties have not expressly agreed for notice; although the half year may be in some cases a "customary half-year": *Doe* d. *Durant* v. *Doe* (2), and *Howard* v. *Wemsley*. (3)

(1) Not reported. (2) 6 Bing. 574. (3) 6 Esp. 53.

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"Six months" is not necessarily equivalent to "half a year." For, primâ facie, "month" means lunar month, except in the case of mercantile instruments: see *Reg.* v. *Inhabitants of Chawton* (1), and *Simpson* v. *Margitson.* (2) In *Rogers* v. *Dock Company at Kingston-upon-Hull* (3), Wood, V.C., held that "months" meant "lunar months" unless by the custom of the district a different meaning was attached to the words; and this decision was not affected by the Court of Appeal afterwards holding that there was evidence of such a custom in the case.

Secondly. The notice necessary to determine this tenancy was expressly agreed upon by the parties, and not implied "by law." Therefore the provisions of s. 51, which relate only to cases where in the absence of any such express agreement a half year's notice is rendered necessary "by law," do not apply. The words "by law" are used in s. 51 to distinguish between express and implied terms of contract. The maxim, modus et conventio vincunt legem, and the phrase "surrender by operation of law," &c., illustrate such use of the words "by law." They would be mere surplusage in s. 51 if not restricted to notices ascertained otherwise than by the express agreement of the parties, although, of course, a notice expressly agreed upon is, in one sense, necessary "by law" which enforces the performance of the agreement. If s. 51 does not apply to this tenancy, then neither s. 56 nor s. 57 affect the mode by which it could be determined, and the notice which the parties agreed for having been given, the tenancy is at an end.

[LORD COLERIDGE, C.J. What is the effect of the deed?]

To create a tenancy from year to year determinable by six months' notice. *Hewitt* v. *Harris* (4) was not a decision that s. 51 applied, but that a sufficient notice to prevent its application had been given under s. 57.

Forbes replied. In *Hewitt* v. *Harris* (4) a written agreement of tenancy was "for the term of a whole year, and so on from year to year so long as the parties should agree, and until the tenancy was determined by six months' notice in writing from either party," and Pollock, B., said that if s. 51 were read "as any Court

(1) 1 Q. B. 247, at p. 250.
(2) 11 Q. B. 23.
(3) 34 L. J. (Ch.) 165.
(4) Not reported.

is bound to read it, in conjunction with ss. 56 and 57, it certainly seems to me tolerably clear that it was intended to apply not merely in cases in which by law without any agreement of the parties the half year's notice was necessary, but to other cases also."

COLERIDGE, C.J. I am about to give a decision which I regret, for it narrows the construction of a useful Act of Parliament; but I must, of course, construe it as the law seems to require. The tenancy alleged in the claim is for a year certain, "and so on from year to year, determinable at the end of the first or any subsequent year on six months' notice to quit from either party" to the other "previous to the time of entry in any year, the said tenancy to commence as to the lands for all purposes on the 2nd day of February then last, and as to the messuages and buildings on the 12th May then instant." Notice to quit was given according to the terms of the contract, viz. six months' notice. That is admitted. The question is, whether, under these circumstances, the Agricultural Holdings Act, 1875, applies to this contract, so as to make it necessary that a year's notice should be given before the tenancy can be determined. This turns on the construction of four sections of the Act. The first of them is s. 51, declaring that "Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for the determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; . . ." No doubt in an ordinary tenancy from year to year, created by such acts of the parties as acceptance of rent at quarter day, or holding over, or otherwise, without any express stipulation for notice to quit, it is incidental to the tenancy that it cannot be put an end to but by a half year's notice, expiring at the end of the year of tenancy. This the draftsman of this Act well knew, for he says, Where a half year's notice is "by law" necessary, a year's notice shall hereafter be necessary. That, no doubt, will apply in all cases where there is no express stipulation as to notice; but by s. 54, "Nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any agreement as they think fit, or shall interfere with the operation thereof."

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Now here the landlord and tenant have entered into such agreement as they thought fit, stipulating between themselves that there should be an absolute tenancy for a term certain, and from that time a tenancy from year to year, determinable by either party giving six months' notice. They have done that which s. 54 declares the Act shall not interfere with. Then s. 56 says, "This Act shall apply to every contract of tenancy beginning after the commencement of this Act, unless in any case the landlord and tenant agree in writing in the contract of tenancy, or otherwise, that this Act, or any part or portion of this Act, shall not apply to the contract. . . ." That section might be important if the true view were that this tenancy from year to year (at least as regards any year after the 13th of August, 1875, the date of the Act) was a new tenancy; but I doubt if that is the true view. Sect. 57 enacts that, "In any case of a contract of tenancy from year to year or at will, current at the commencement of this Act, this Act shall not apply to the contract, if within two months after the commencement of this Act the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy shall remain unaffected by the Act; . . . and in the absence of any such notice . . . . this Act shall apply to the contract. . . ." It is admitted that no such notice was given here, and therefore, if the Act is applicable, nothing has been done under ss. 56 or 57 to take the case out of the operation of it. But does the Act apply? I am afraid I must decide that it does not. The true effect of the deed seems to be that all the holding, until the determination, is under the deed. A tenancy from year to year may be created in many ways, and from the slightness of the tenancy and the cost of deeds, it is not usual to create it by deed. But the parties may, if they choose, contract by deed for such a tenancy. I think the present case is one of a tenancy from year to year, created by deed. Therefore this is a contract which the landlord and tenant have entered into so that six months' notice is required to determine it. Now I find that in cases of great authority, *Parker* d. *Walker* v. *Constable* (1) and *Doe* d. *Shore* v. *Porter* (2), where the parties had not agreed for it, and six months' notice to quit had

(1) 3 Wils. 25. (2) 3 T. R. 13.

been given, it was held to be an inflexible rule that six months' notice was insufficient, and a half year's notice was necessary to determine the tenancy. Mr. Justice Buller, said in *Doe* d. *Flower* v. *Darby* (1), a case of a yearly tenancy at an annual rent, that there should have been a half year's notice to quit before the end of the term, and added (2), "This gives rise to another objection in this case . . . . upon the distinction between six months and a half year. The case in the Year Books (13 H. 8. 156) requires a half year's notice; but here there is less than a half year's notice, and therefore it is bad on that ground also." That case followed *Parker* d. *Walker* v. *Constable* (3) exactly to the same effect, and I am not aware that those authorities have been questioned. Indeed it is plain that six months' notice is not a half year's notice. (4) I therefore hold that the notice agreed for and given was sufficient to determine the tenancy, and I overrule the demurrer.

Judgment for the plaintiff.

Solicitors for plaintiffs: *Crowder, Anstie, & Vizard.*
Solicitors for defendant: *Ridsdale & Co.*

BROCKLEBANK & CO. *v.* THE KING'S LYNN STEAMSHIP COMPANY.

Feb. 28.

Bankruptcy—Practice—Security for Costs—Filing Petition under the Bankruptcy Act.

Security for costs, where the plaintiff has become bankrupt or has filed a petition for liquidation, is not necessarily confined to *future* costs, but may, when applied for promptly, be extended to costs already incurred in the suit.

Oxenden v. *Cropper* (4 Dowl. 574) overruled.

ACTION for breach of a charterparty. After the cause had been set down for trial, the plaintiffs filed a petition for liquidation under s. 125 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. On the 29th of January, 1878, application was made by summons

(1) 1 T. R. 159.
(2) 1 T. R. at p. 163.
(3) 3 Wils. 25.
(4) See *Morgan* v. *Davies*, *ante* 260.

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calling upon the plaintiffs to give security for costs, and the master ordered that security should be given to the amount of 50*l.*, but in respect of *future* costs only. Upon appeal against this order, Field, J. varied it by making it extend to costs *already incurred.*

H. Kisch, moved by way of appeal. The order was not warranted so far as regards the costs already incurred. It is true that, in *Harvey* v. *Jacob* (1) and *Mason* v. *Polhill* (2), security was ordered to be given for retrospective as well as prospective costs; but, in a subsequent case, *Oxendon* v. *Cropper* (3), Patteson, J., refused to compel the plaintiff to give security for costs already incurred. In *Republic of Costa Rica* v. *Erlanger* (4), Lord Justice James says: "For the 1000*l. already* incurred, no security can be given within the meaning of this rule." (5) In *Grant* v. *Banque Franco-Egyptienne* (6), upon a motion for security for costs of appeal, made after the time fixed for the hearing, Lord Justice James said: "It is too late to make the application, so far as regards any costs already incurred, after the time has been actually fixed for the hearing of the appeal."

Anstie, contrà. *Harvey* v. *Jacob* (1) was a decision of the full Court, and neither that case nor *Mason* v. *Polhill* (2) was cited in the case before Patteson, J. The learned judge thought more weight should be attributed to the former than to the latter case. That the plaintiff was a criminal was hardly a circumstance which could be relied on as a distinction. The reason of the rule allowing security for costs where the plaintiff files a petition for liquidation is given by Blackburn, J., in *Malcolm* v. *Hodgkinson*. (7)

[LINDLEY, J. The form of the order for security in Seton on Decrees, 3rd ed. 1269, makes no distinction between future costs and costs already incurred.]

(1) 1 B. & A. 159.
(2) 2 Dowl. 61.
(3) 4 Dowl. 574.
(4) 3 Ch. D. 62, 69.
(5) "In any cause or matter in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form as the Court or a judge shall direct." And see No. 7 of the Rules of February, 1876.
(6) 1 C. P. D. 143.
(7) Law Rep. 8 Q. B. 209.

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DENMAN, J. *Harvey* v. *Jacob* (1) is an express authority upon the point. I see no distinction in principle between that case and the present. The case of *Republic of Costa Rica* v. *Erlanger* (2) differs in this, that all the circumstances were known to the defendant from the very commencement of the suit; and when *Oxenden* v. *Cropper* (3) was before Patteson, J., the previous cases were not cited. I think my Brother Field was quite right in acting upon the decision of the Court of Queen's Bench.

LINDLEY, J. I am of the same opinion. The only case in favour of this appeal is *Oxenden* v. *Cropper*. (3) That, however, is opposed to a former case (not cited) where the question was apparently fully gone into, and before the full Court. I think, therefore, the earlier decision ought to prevail. The matter was not argued in *Erlanger's Case* (2), and there was a delay of two years there: nor do I think that Order LV. has any application to the matter. The rule, as stated in Daniell's Chancery Practice, 32, 33, 5th ed., shews that the common form of order is applicable to security for the whole costs, and is not limited to after accruing costs. The practice seems to me to be well settled, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Kisch, Son, & Hanbury.*
Solicitors for defendants: *Flux & Leadbitter.*

(1) 1 B. & A. 159. (2) 3 Ch. D. 62.
(3) 4 Dowl. 574.

1878
April 6.

RAWLINS *v.* BRIGGS.

Landlord and Tenant—Lease, Construction of—Covenant to pay Taxes, &c.

4 C.P.D. 370
5 C.P.D. 487
491

Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement except land-tax and landlord's property-tax," and further "to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of parliament or otherwise howsoever."

During the term the lessor received from the sanitary authority a notice, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94, to abate a nuisance injurious to health arising from the bad condition of the drains upon the premises, and in order to prevent proceedings against him, executed the required works:—

Held,—upon the authority of *Tidswell* v. *Whitworth* (Law Rep. 2 C. P. 326)—that, the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the demised premises or in respect thereof," but in performance of a duty imposed upon him by the Act of Parliament, he was not entitled to call upon the lessee under his covenant to re-pay the amount.

Thompson v. *Lapworth* (Law Rep. 3 C. P. 149) distinguished.

Statement of Claim. 1. The plaintiff is the lessor and the defendant is the lessee of certain houses and premises known as Nos. 119 and 121, London Street, Reading, Berks.

2. By an indenture of lease of the 20th of October, 1873, the plaintiff demised the houses and premises to the defendant for twenty-one years from the 29th of September preceding, subject to the covenants and conditions therein contained.

3. The defendant thereby covenanted to pay to the plaintiff during the term the yearly rent of 65*l*. without any deduction or abatement except land-tax and landlord's property-tax.

4. The defendant also covenanted thereby from time to time to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid), then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of parliament or otherwise howsoever.

5. The defendant from the date of the indenture, and during the month of May, 1877, has been and still is the occupier of the houses and premises.

6. On the 14th of May, 1877, the urban sanitary authority for the borough of Reading and for the district within which the houses were and are situated, in pursuance of the powers of the Public Health Act, 1875, duly gave notice to the plaintiff that the sanitary authority, being satisfied of the existence of a nuisance injurious to health at and upon the said houses and premises, arising from the bad condition of the drains upon the premises, and from the want of sufficient drains, thereby required the plaintiff within six weeks from the service of the notice to abate the same, and for that purpose to construct a proper and sufficient covered drain or drains emptying into the sewer of the said sanitary authority, for the effectual drainage of the houses and premises, to empty and cleanse and further fill up and deodorize and arch over the existing cess-pool.

7. The notice further stated that, if the plaintiff made default in complying therewith, summary proceedings would be taken to enforce the abatement of the nuisance, and to recover costs and penalties incurred thereby.

8. Upon the receipt of this notice, the plaintiff required the defendant to execute the said works or to pay the costs thereof, but the defendant refused to execute the works or to pay for the same, and denied his liability in respect thereof.

9. Thereupon, and in order to prevent any further proceedings, the plaintiff by his servants and agents executed the works according to the notice and to the plans and directions of the sanitary authority.

10. The plaintiff has paid for the execution of the works, 25*l.*

Claim 25*l.* and interest.

Demurrer, on the ground that the statement of claim does not shew any contract by the defendant to repay to the plaintiff money expended by the plaintiff in the improvement of the plaintiff's freehold, or expended by the plaintiff in compliance with a notice to him to construct additional drainage on his own premises. Joinder.

Goodwin, in support of the demurrer. The principle which runs through the cases upon this subject is, that, where the legislature casts a duty or charge upon the owner of premises, there must be

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clear and unambiguous words to shift the burden from him to the tenant or occupier. *Tidswell* v. *Whitworth* (1) is in point. There the defendant leased premises at the "clear yearly rent of 90*l.*" and covenanted that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property-tax) which during the term should become payable in respect of the demised premises:" the town council gave notice to have the street in which the premises were situate sewered and paved: the lessor neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at 213*l.* 3*s.* 6*d.*, which he paid: and it was held that, the payment having been made by the plaintiff, not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed upon *him* by the Act of Parliament, he was not entitled to call upon the defendant under his covenant to re-pay him the amount. *Sweet* v. *Seager* (2), which was there cited, was distinguished by Willes, J., upon the ground that in that case "the tenant not only undertook to make money payments assessed upon or in respect of the premises, but also to bear burthens and to perform duties and services, and so bound himself to indemnify the landlord against a payment imposed upon him in respect of a burthen which the tenant had taken upon himself." *Thompson* v. *Lapworth* (3), *Bird* v. *Elwes* (4), and *Crosse* v. *Raw* (5), are distinguishable upon the same ground as *Sweet* v. *Seager*. (2) The 94th section of 38 & 39 Vict. c. 55 casts upon the landlord the duty of abating a nuisance arising from the defective construction of a structural convenience.

M'Coll, contrà. The payment in question was a charge, assessment, or imposition, charged or imposed upon the demised premises, or in respect thereof, within the meaning of the covenant in question. The lessor stipulates for a "clear yearly rent," free from deductions by whatsoever authority imposed. *Thompson* v. *Lapworth* (3) is precisely in point; and it is consistent with *Sweet* v. *Seager* (2), *Bird* v. *Elwes* (4), and *Crosse* v. *Raw* (5), which virtually overrule the case of *Tidswell* v. *Whitworth* (1) relied on

(1) Law Rep. 2 C. P. 326.
(2) 2 C. B. (N.S.) 119.
(3) Law Rep. 3 C. P. 149.
(4) Law Rep. 3 Ex. 225.
(5) Law Rep. 9 Ex. 209.

by the defendant. The duty in question arises out of the provisions of the Public Health Act, 1875 (38 & 39 Vic. c. 55). By s. 94 of that Act, where a nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice to abate the nuisance is to be served on the owner, which by the interpretation clause, s. 4, means "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." By ss. 95 and 96, the offender may be summoned before a justice who may make an order dealing with the notice. A penalty of 5*l.* is imposed by s. 103 for disobedience of the order: and by s. 104 the costs and expenses and any penalties incurred in relation to any such nuisance are made recoverable from the occupier, who may deduct the same out of the accruing rent,—that is, in the absence of any covenant whereby the tenant agrees to take the burden upon himself. This is an imposition "in respect of the premises" within the meaning of the covenant. If *Tidswell* v. *Whitworth* (1) cannot be reconciled with *Thompson* v. *Lapworth* (2), the later decision must prevail.

LINDLEY, J. I am of opinion that this demurrer should be allowed. I am unable to distinguish this case from *Tidswell* v. *Whitworth*. (1) The question turns upon the true construction of the covenants in a lease. In the first place, there is a covenant to pay the yearly rent of 65*l.* "without any deduction or abatement except land-tax and landlord's property-tax." That is only material as throwing light upon the next covenant, by which the tenant contracts to "pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of parliament or otherwise howsoever." Now, the landlord must shew that the money which he seeks to recover by this action comes within some or one of these words "rates, charges, assessments,

(1) Law Rep. 2 C. P. 326. (2) Law Rep. 3 C. P. 149.

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and impositions, charged, assessed, or imposed on the premises demised or in respect thereof." It is obvious that that alone is made a charge upon the premises which is expended by the landlord in respect thereof. In what sense is the money which the plaintiff has expended, a sum paid in respect of a charge or assessment imposed on the premises? The several sections of the Public Health Act, 1855 (38 & 39 Vict. c. 55), which have been referred to,—ss. 94, 98, 104, 207,—throw upon the landlord the duty of removing a nuisance arising from the want or defective construction of any structural convenience. The cost of that which is done in the performance of his duty cannot become a charge upon the tenant without express covenant. It seems to me that what the plaintiff was called upon to do here is precisely analogous to what the plaintiff was required to do in the case I have referred to. The language of the covenant in that case does not substantially differ from that used here: and the reasoning of the judges applies as much to this case as to that. It is said that the present covenant more nearly resembles that in *Thompson* v. *Lapworth* (1), *Bird* v. *Elwes* (2), and *Crosse* v. *Raw* (3); and that *Tidswell* v. *Whitworth* (4) is virtually overruled. But in each of those cases the language of the covenant was different from that of *Tidswell* v. *Whitworth* (4), and great care was taken to distinguish them on the ground of such dissimilarity of words. In *Thompson* v. *Lapworth* (1), the covenant was to pay and discharge "all taxes, rates, *duties*, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed *on the tenant or landlord* of the demised premises in respect thereof." Those words are much more extensive than the words used here. Willes, J., in *Thompson* v. *Lapworth* (1) points out the difference between *Tidswell* v. *Whitworth* (4) and that case.

The payment in question is not within the covenant, and it follows that the plaintiff cannot recover.

Demurrer allowed, with costs.

Solicitor for plaintiff: *W. Rawlins.*

Solicitors for defendant: *Rooke & Son, for W. J. Brain, Reading.*

(1) Law Rep. 3 C. P. 149.
(2) Law Rep. 3 Ex. 225.
(3) Law Rep. 9 Ex. 209.
(4) Law Rep. 2 C. P. 326.

PERCY ATTENBOROUGH *v.* THE LONDON AND ST. KATHARINE'S DOCK COMPANY.

ROBERT ATTENBOROUGH *v.* THE SAME.

1878
March 25;
April 8.

*Interpleader—Indorsee of Dock Warrant—*1 *&* 2 *Wm.* 4, *c.* 58, *s.* 1*—Different Liabilities—Damages for Detention.*

L. shipped wine at Cadiz for London under bills of lading making it deliverable to D. or his assigns. D. caused it to be deposited with the defendants, a dock company, and received from them dock-warrants making the wine deliverable to D. or his assigns, and these he indorsed to the plaintiff to secure the payment of advances made by the plaintiff. L. afterwards served notice upon the defendants not to part with the wine, alleging that it had been obtained from him by fraud, and the plaintiff commenced an action against them for wrongfully detaining it:—

Held, that the defendants were not entitled to relief under the Interpleader Act; for, first, damages were claimed from them which could not be recovered against L.; and, secondly, they had, by issuing the dock-warrants, induced the plaintiff to change his position.

In May, 1877, Lopes, a wine grower at Cadiz, shipped on board the *Gibraltar*, for London, a quantity of sherry, consigned to Dolaro or his assigns. One lot consisting of thirteen butts was entered by Dolaro at the Custom House on the 7th of June, and received by the London and St. Katharine Docks Co. and placed in their bonded vaults. On the 12th of June the company issued thirteen warrants (each representing one butt), making it deliverable to Dolaro or assigns. On the 31st of October, a claim was made by Lopes and notice given by him to the company not to part with the wine, on the ground that it had been obtained from him by fraud. Actions were also commenced against the company for the detention of the wine by the plaintiffs, to whom the warrants had been indorsed by Dolaro for moneys advanced by them to him. The company thereupon took out a summons calling upon the respective claimants to interplead, which came on for hearing before Field, J., who dismissed it, with costs.

April 1. *Watkin Williams, Q.C.* (*Wood Hill*, with him), moved by way of appeal against the order. The main question is whether by issuing these dock-warrants to Dolaro, the defendants have entered into a contract with him that is inconsistent with the

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position which they now assume: *Meynell* v. *Angell.* (1) In Blackburn, on the Contract of Sale, p. 197, it is suggested that the indorsement of a delivery order or dock-warrant has not (independently of the Factors Acts) any effect beyond that of a token of an authority to receive possession. If Lopes has parted with the property in this wine, no matter how fraudulently Dolaro may have acted, or if Lopes fails to shew that he has not done so, his claim should be barred: if, on the other hand, it appears that there is a primâ facie case on his part to shew that the property still remains in him, the two adverse claimants ought to be made to try their respective rights by an issue.

Marriott, Q.C., for the plaintiffs. *Crawshay* v. *Thornton* (2), which is supported by *Meynell* v. *Angell* (1) and *Best* v. *Hayes* (3), is precisely in point. There, iron had been deposited with Messrs. Crawshay & Co., who were wharfingers, by Messrs. Raikes & Co., agents for Daniloff, of St. Petersburg. The iron having been sold by Raikes & Co. to Thornton & Co., the latter applied to Crawshay & Co. for delivery. Crawshay & Co. having received notice from Daniloff not to part with the iron, declined to deliver it to Thornton & Co. The latter thereupon brought an action, to relieve themselves from which Crawshay & Co. filed a bill of interpleader, which, after argument on demurrer, was refused upon the grounds upon which the dock company's claim to have an issue here is resisted, viz. that interpleader is never granted unless the claimant can have all the same rights against the substituted defendant as he would have had against the original defendant. Here the Messrs. Attenborough are not merely claiming against the dock company the wine or its value, but also damages for the wrongful detention,—a larger remedy than they could have as against Lopes. Actions have been brought against Messrs. Attenborough by their vendees; and for any damages which may be recovered in these actions it is clear Lopes would not be liable to them: as between them, the question would simply be the right of property. The governing principle is, that a plaintiff's rights shall not be altered or diminished by an interpleader. In dealing with this question, the Court will bear in mind that Lopes is a foreigner over whom they have no jurisdiction.

(1) 32 L. J. (Q.B.) 14. (2) 2 My. & Cr. 1. (3) 1 H. & C. 718.

Watkin Williams, Q.C., in reply. The substantial complaint of the plaintiffs is the conversion or detention of their property.

Sullivan, for the claimant.

LORD COLERIDGE, C.J. I am of opinion that the order of Mr. Justice Field was quite correct, and that this motion must be dismissed. I base my judgment upon two grounds. It seems that Lopes asserts (and for aught I know may truly assert) that he has been defrauded of this wine, that the person who deposited it with the dock company obtained it under circumstances which gave him no property in it, and that the plaintiffs obtained the warrants under circumstances which passed no property in the wine to them. Lopes has given a formal notice of his claim to the dock company, and requests them not to part with the wine. It is upon this state of facts that the dock company seek to interplead. The action is brought by Messrs. Attenborough, not only for the recovery of the wine, but also to recover damages in respect of its detention,—not so much, as I understand it, that they have made contracts for the sale of it, as that they have made advances upon the faith of the warrants, which advances they will lose if they do not get the wine.

It appears to me that, under these circumstances, the company are not entitled to interplead. In the first place, it seems to me that we cannot give to the plaintiffs in the action the same remedies and advantages, by substituting Lopes as the defendant, which he has by having the dock company for defendants. I think it is extremely doubtful whether, upon such a notice as was here given, Lopes would be answerable for all that the company have chosen to do, or for any damage (if damage there has been) which is the result of the company's acting upon that notice. The company have not asked for an indemnity; nor has Lopes offered it. Under these circumstances, to substitute Lopes, a foreigner, as defendant instead of the dock company, would not be placing the plaintiffs in the same position as they at present stand in. The subject-matter of the action against the one would not be the same as that against the other; and the remedies would not be co-extensive.

There is also a further objection which I think it right to

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mention, and upon which I desire partly to found the decision at which I have arrived. The dock company have issued warrants making the wine deliverable to Dolaro or his assigns. The plaintiffs are assigns. I do not for a moment forget the distinction insisted upon between bills of lading and dock-warrants; but although it may be true that the one conveys the property in the goods only, and the other conveys both property and possession, inasmuch as a man who indorses and delivers a bill of lading does all he can possibly do under the circumstances, and transfers all he can possibly transfer, and the assignee can do no more than take the bill of lading; whereas one who receives a dock-warrant may do more, because he can go with it and ask for and obtain actual possession of the goods. This is not a distinction which is important in this case, because I apprehend that if, upon the representation of a person who seeks to interplead, one of the claimants has been placed in a different position from that in which he would otherwise have been placed through acting upon the faith of that representation, the person who has so induced him to act is not entitled to call upon him to interplead. Upon the principles upon which rests the doctrine of interpleader, as I find them laid down in the leading case of *Crawshay* v. *Thornton* (1), this is exactly one of those cases in which the person seeking to interplead has so committed himself to one of the two parties claimants of the subject-matter, that he does not stand in a position of absolute impartiality between them, and has therefore disentitled himself to relief by way of interpleader.

HUDDLESTON, B. I am of the same opinion. I do not wish to express any opinion as to whether a dock-warrant is in itself in the nature of a special obligation towards the holder of such an instrument. The ground upon which I arrive at the conclusion I do is this, that, looking at all the circumstances, I do not find that the same question could be raised upon an issue to be tried between Lopes and the plaintiffs as is raised in the action between the plaintiffs and the present defendants: and that, as it seems to me, is the principle which ought to guide the judge in the exercise of his discretion as to whether an interpleader issue should be granted

(1) 2 My. & Cr. 1.

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or not, and which should guide the Court upon an appeal against his decision. Now, as between Messrs. Attenborough and the dock company, the question in dispute, as I collect it from the statement of claim and the affidavits, was, not simply whether the former were entitled to the wine or its value, but also damages for its conversion or detention. If that be so, I do not see how, in any interpleader issue between Messrs. Attenborough and Lopes, the former could recover those damages as against him. It seems to me that, if we were to give the company the relief they ask for, it could only be done at the expense of the plaintiffs. Under the circumstances, I think the learned judge who refused to grant an issue in this case exercised a wise discretion, and that this motion should be dismissed with costs.

Order refused.

Solicitors for Percy Attenborough: *G. H. K. and G. A. Fisher.*
Solicitor for Robert Attenborough: *John Attenborough.*
Solicitor for defendants: *Hacon.*

THE GUARDIANS OF THE POOR OF THE PARISH OF SAINT LEONARD'S, SHOREDITCH *v.* FRANKLIN.

June 28.

Corporation—"Person or Persons"—Common Informers (1 & 2 *Wm.* 4, *c. lxxvi.*), *ss. xlv., lxxxv.—Action for Penalties.*

A corporation cannot sue for penalties as a common informer, unless expressly empowered by statute so to do.

The Act 1 & 2 Wm. 4, c. lxxvi. by s. xlv. imposes a penalty on coal dealers who knowingly sell one sort of coals for another within a certain district, and the penalty is recoverable under s. lxxxv. "by the person or persons who shall inform and sue for the same":—

Held, that a board of guardians, being a corporation, did not come within the terms of s. lxxxv., and therefore could not sue for the penalty.

5 Q B D 31
6 Q B D 22
7 Q B D 40

CLAIM, after alleging a contract for the sale of coal to the plaintiffs by the defendant and a breach by the delivery on certain occasions of coals which were not of the quality or description ordered and contracted for, further stated that on the occasions aforesaid, the defendant being a seller of coals and dealer in coals, did knowingly sell one sort of coals for and as

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a sort which they really were not, within the distance of twenty miles from the General Post Office, contrary to the form of the statutes in that behalf, and became liable to pay for every such offence the sum of 10*l.* for every ton of coals so sold.

The plaintiffs claimed first 300*l.* damages for breach of contract; and, suing as well for the Queen as for themselves, also claimed 1780*l.*

Demurrer to that part of the statement of claim on which the claim for penalties was based, on the grounds that the plaintiffs, being a corporation, could not be a common informer or common informers, and that the plaintiffs were not empowered to sue for penalties by the Act under which the claim was made. (1)

Raymond, for the defendant. A corporation cannot sue as a common informer: Chitty's Archbold's Practice, 12th ed. p. 1145. The authority there cited is the *Weavers' Company* v. *Forrest* (2), in which the decision was on a point of pleading, viz., whether a defendant who had oyer of a charter was bound to insert it in his plea, but to the marginal note of the point the reporter adds, "N.B. It was held in the C. B. (where other like actions were brought) that the words of 7 Geo. 2 being 'any person or persons,' a corporation could not sue as a common informer."

In *Walker* v. *Richardson* (3), a lease of lands by an ecclesiastical corporation to charitable uses was held not to be within

(1) 1 & 2 Wm. 4, c. lxxvi., "An Act for regulating the Vend and Delivery of Coal in the Cities of London and Westminster," &c.

Sect. xlv. enacts, That if any seller or dealer in coals shall knowingly sell one sort of coals for and as a sort which they really are not, within the port of London . . . or within the distance of twenty-five miles from the General Post Office, every such seller or dealer shall forfeit and pay for every such offence 10*l.* per ton for every ton of coals so sold.

Sect. lxxxv. enacts, That all fines, penalties, or forfeitures exceeding the sum of 25*l.* by this Act imposed for any offence or offences committed against this Act shall and may be recovered by action of debt, bill, plaint, or information in any of His Majesty's Courts of Record at Westminster . . . "by the person or persons who shall inform and sue for the same," within three calendar months after the offence or offences shall be committed; and one moiety of all such fines, penalties, or forfeitures shall be to and for the use of . . . the King, his heirs and successors, and the other moiety thereof, together with double costs of suit, shall be to and for the use of "the person or persons who shall inform or sue for the same."

(2) 2 Str. 1241.

(3) 2 M. & W. 882, 890.

the Mortmain Act, 9 Geo. 2, c. 36, s. 1, which prohibits conveyances of lands "by any person or persons whatsoever" in trust, or for the benefit of any charitable uses whatsoever. Parke, B., said the section extended only to grants by natural persons.

[LORD COLERIDGE, J. Suing under the old penal statutes the informer had to make an affidavit, which a corporation would be unable to do.]

And in early times an informer had to inform ore tenus. The only cases of corporate informers to be found in the books are actions for penalties under the Apothecaries Act 55 Geo. 3, c. 194, which, however, by s. 26, expressly empowers the master and wardens of the Apothecaries Company to sue: see Bullen and Leakes' Precedents of Pleading, 3rd ed. p. 233. If the words "person or persons" include corporations, then the numerous interpretation clauses declaring that "person or persons" in particular Acts of Parliament shall include corporations, have been needless. Corporations are not formed for purposes of suing as informers. If they could sue it is possible that a company might be established for the sole object of bringing qui tam actions on forgotten penalty clauses in obsolete statutes.

The case does not come within the letter of the Act, which is penal, and should be construed strictly.

Austen, for the plaintiffs. The dictum in Chitty's Archbold's Practice, 12th ed. 1145, is founded on a mere note by the reporter of the *Weavers' Company* v. *Forrest*. (1) But the decision in that case is not in point. Nor is *Walker* v. *Richardson* (2), for the object of the Mortmain Act, 9 Geo. 2, c. 36, s. 1, as the preamble shews, was to prevent the conveyance in mortmain of lands held by "languishing and dying persons"—terms inapplicable to a corporation aggregate. The Court said that the lease by a corporation of lands which were already in mortmain was neither within the words nor the spirit of that Act. In "The Exposition of the Statute, 39 Eliz. c. 5" (3), which authorizes the erection of hospitals by "all and every person and persons seised of an estate in fee simple, their heirs, executors, or assigns," Lord Coke

(1) 2 Str. 1241. (2) 2 M. & W. 882.
(3) 2 Inst. 720, 722.

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commenting on the phrase "all and every person and persons," says: "These words regularly do extend to any body politick or corporate, but not to such as are restrained by any Act of Parliament to alien, &c., but doth extend to such bodies politick and corporate as may alien, as manors and commonalties, bayliffs, and burgesses, etc., and the like, and to all other persons whatsoever." Grant on Corporations, says in a note to p. 66, that "'person' in a statute relative to forgery was held not to be applicable to the aggregate body of a corporation: *Harrison's Case* (1); but since 1 Wm. 4, c. 66, s. 28, the law is otherwise." The section provided that "person" should throughout the Act be deemed to include any body corporate. So 7 & 8 Geo. 4, c. 28, for improving the administration of justice in criminal cases, declares that statutes relating to offences shall be understood to include bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction: sect. 14. Thus the tendency of the legislature to expand the meaning of the word "person" in Acts of Parliament is evident.

Raymond, in reply.

LORD COLERIDGE, C.J. So far as I know, this is a case primæ impressionis, but not without clear authority bearing on the question although not directly deciding it. The plaintiff corporation having had bad coals supplied by the defendant, not only sue him for damages for breach of contract in failing to supply good coals, but proceed further to sue him for a large sum for the breach of duty of which he has been guilty in violating, 1 & 2 Wm. 4, c. lxxvi. The corporation say that the breach of contract was so bad that they are entitled not only to damages but to the penalties imposed by sect. xlv., which exceed the sum of 25*l.* and are recoverable under sect. 85, "by the person or persons who shall inform and sue for the same." It is suggested that the corporation are within the terms of sect. 85, and can sue. Undoubtedly the corporation may be, in one sense, included within the terms "person or persons." But the Act must be construed secundum subjectam materiem, and I must ascertain whether it would be reasonable that the corporation should be within the words. If the case had

(1) 1 Leach, 180; 2 East, P. C. 988; 2 Russ. Crim. 385.

arisen under one of the old penal statutes it would have been too clear for argument, as some of the conditions precedent to maintaining the action would have been such as a corporation could not from its very nature perform, and therefore to have held a corporation included in the words "person or persons," would have made nonsense of the Act (1). I agree that such a construction would not make nonsense of this Act. But the general current of authorities seems to shew that a corporation cannot be common informers. The argument that in numerous statutes corporations are empowered to sue has an important bearing against the plaintiffs, for the fact that it has been thought not only well but prudent to include corporations in special terms rather tends to shew that they otherwise would not have been included. No doubt the provisions in many statutes enabling the recovery of penalties have been extended to corporations, not, however, by making corporations do things beyond their nature, but by saying that things done by others on behalf of corporations, should give them the same advantage as if done by them. The statutes as to inspection, and exhibiting interrogatories in legal procedure, &c., which prescribe that certain acts shall be done for corporations by certain officers, all tend to shew that corporations are by the very necessity of their nature excluded from doing such acts.

I think it undesirable that corporations should be common informers. The general dictum of the text-books is against it. Under all the earlier statutes corporations could not have been informers, and I think they cannot be so in this case, and I must give effect to the demurrer.

Judgment for the defendant.

Solicitors for plaintiffs: *Carey, Warburton, & De Paula.*
Solicitors for defendant: *Ley & Mould.*

(1) See Tidd's Practice, 9th ed., p. 518.

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Nov. 22.

[IN THE COURT OF APPEAL.]

GOODHEW *v.* WILLIAMS.

Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 6, 16, 17, 18, 54—*Metropolis Management Amendment Act*, 1856 (19 *&* 20 *Vict. c.* 112), *s.* 4—*Election of Vestrymen*—"*Rated or Assessed*"—*Acting without Qualification*—*Penalty*—*Inspectors of Votes*—*Finalty of Decision as to Persons chosen to act as Vestrymen*—*Claim to be rated*—*Payment or Tender of last-made Rate.*

The defendant was joint occupier with his father and brother of certain hereditaments in a metropolitan parish of sufficient value to entitle him to be elected vestryman; a rate was made in April, 1876, upon the father only; in May the defendant was elected vestryman; an objection was raised to his return, but the inspectors of votes declared him to be duly qualified and elected; in June the defendant sat and voted as vestryman; in July he required the demand-note of the rate made in April to be altered so as to extend to himself as well as to his father, and in October he jointly with his father paid the rate:—

Held, that the defendant in May was neither "rated" nor "assessed" within the meaning of the Metropolis Management Act, 1855, s. 6, and was not qualified for election as vestryman; that the decision of the inspectors of votes as to his election was not conclusive; that by sitting and voting as vestryman in June he had incurred the penalty imposed by s. 54 of that statute for acting without qualification; and that his liability to the penalty was not taken away, upon the subsequent payment of the rate, by the Metropolis Management Amendment Act, 1856, s. 4.

APPEAL by the defendant from judgment at the trial before Manisty, J.

The action was brought to recover a penalty for acting as vestryman for the parish of Rotherhithe without being qualified as is required by the Metropolis Management Act, 1855. (1) At

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 6, "The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor" upon a certain rental; "and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish . . . . Provided also, that the joint occupation of any such premises as aforesaid, and a joint rating in respect thereof, shall be sufficient to qualify each joint occupier" in case the premises are of adequate value.

Sect. 15: "The rate-collectors, or persons appointed by them, shall attend the churchwardens and persons presiding at elections under this Act, and inspectors of votes, to assist in

the trial it was proved that in 1874 the defendant, his father, and his brother became occupiers of certain railway arches of sufficient value to qualify each of them to be elected as vestryman for the parish; from that year down to May, 1876, the father only was rated or assessed to the poor as occupier of the arches; the rates were paid by the firm of Williams & Sons. Upon the 11th of

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ascertaining that the persons presenting themselves to vote are parishioners rated to the relief of the poor in the parish or the respective wards thereof, and duly qualified to vote at the election."

Sect. 16 authorizes the appointment of inspectors, and provides for the election of vestrymen by the parishioners.

Sect. 17 allows a poll to be demanded and taken.

Sect. 18 contains directions as to the mode of voting, and enacts that the inspectors "shall forthwith meet together, and proceed to examine the said votes, and if necessary shall continue the examination by adjournments from day to day, not exceeding two days (Sunday excepted), until they have decided upon the persons duly qualified according to the provisions of this Act who may have been chosen to fill the aforesaid offices."

Sect. 19: "In case an equality of votes appear to the aforesaid inspectors to be given for any two or more persons to fill either of the said offices, the inspectors shall decide by lot upon the person to be chosen."

Sect. 22: "The inspectors shall, immediately after they have decided upon whom the aforesaid elections have fallen, deliver to the churchwardens, or one of them, or other the person presiding at the election, a list of the persons chosen by the parishioners to act as vestrymen . . . . and the said list, or a copy thereof, shall be published in the parish as herein provided."

Sect. 54: "Any person who acts as a member of any such vestry as aforesaid without being qualified by rating and occupation as required by this Act, shall for every such offence be liable to a penalty of 50*l*., which may be recovered by any person who may sue for the same in any of the superior courts of law with full costs of suit: Provided also, that all acts and proceedings of any person . . . . disabled from acting as aforesaid, shall, if done previously to the recovery of such penalty, be valid and effectual to all intents and purposes whatsoever."

By the Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 4, the occupier of any tenement may claim to be rated; "and upon such occupier so claiming by notice in writing left at the office or place of residence of the overseers of the poor of the parish, or one of them, and actually paying or tendering at such office or place of residence the full amount of the last made rate then payable in respect of such premises, such overseers are hereby required to put the name of such occupier on the rate for the time being . . . . and in case the said overseers neglect or refuse so to do, such occupier shall nevertheless for the purposes of" the Metropolis Management Act, 1855, "be deemed to have been rated to the said rate in respect of such premises from the period at which the rate for the time being in respect of which he so claimed to be rated as aforesaid was made, and thenceforth so long as he continues in the occupation of the said premises."

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April, 1876, a poor-rate was made, and the name of the father alone was inserted as occupier of the arches. Afterwards the defendant wrote a letter to the churchwardens and overseers of the parish requesting that his name should be inserted in the rate-book as a partner in the firm of Williams & Sons; the letter was not acted upon, and the rate remained unaltered. On the 16th of May the election of vestrymen for the parish of Rotherhithe took place; there were several vacancies, and the defendant was one of the candidates returned; he was objected to, but the inspectors appointed under the Metropolis Management Act, 1855, declared that the defendant was duly qualified and elected, and a return was made that he was elected. In the same month the rate made in April was demanded of the father of the defendant. On the 6th of June the defendant sat and voted in the vestry. On the 5th of July, and again on the 26th of July the defendant sent a letter to the churchwardens requiring that the demand-note for the rate should be altered; it was altered by the addition of the words "& Sons" to the name of the father, and the rate was paid by the firm of Williams & Sons in October.

Manisty, J., ordered judgment to be entered for the plaintiff on the authority of *Moss* v. *Overseers of St. Michael, Lichfield.* (1)

Philbrick, Q.C., and *J. R. Wright*, for the defendant. First, the defendant was sufficiently "rated or assessed" within the meaning of the Metropolis Management Act, 1855, s. 6: he, as a member of the firm of Williams & Sons, paid the poor-rates in 1874 and 1875, and also the rate made in April, 1876, after the demand-note had been altered so as to include him as one of the parties liable to pay the rate: this was a sufficient assessment to qualify him for election as vestryman: *Reg* v. *Inhabitants of Hulme* (2). There is a great difference between "rating" and "assessment:" the former refers to the actual entry of the name in the list of persons liable to pay, whereas the latter merely means payment by the person intended to be charged; therefore the defendant was at least "assessed" if he was not "rated," and the enactment being in the disjunctive, the present action is not maintainable. At the trial Manisty, J., relied upon *Moss* v. *Overseers of St. Michael, Lich-*

(1) 7 Man. & G. 72. (2) 4 Q. B. 538.

field (1); but that case is not in point, for it was decided upon the construction of statutes relating to the parliamentary franchise. Secondly, the decision of the inspectors was final and cannot now be called in question: *Reg.* v. *St. Pancras.* (2) Thirdly, at all events the liability to be sued was taken away by the Metropolis Management Amendment Act, 1856, s. 4, after the defendant in July, 1876, caused the demand-note to be altered, and in October, 1876, as a member of the firm of Williams & Sons, paid the rate made in the preceding April. By force of this enactment, if the penalties were incurred, they have ceased to be payable.

Joseph Brown, Q.C., for the plaintiff. First, in the Metropolis Management Act, 1855, s. 6, the words "rated" and "assessed" probably are identical, and mean the entry of the name of the inhabitant of the parish in the list of occupiers, and the amount at which he is chargeable; but if they are distinguishable, "rated" must refer to the entry of the name, and "assessed" to the entry of the amount; but since the name of the father was entered in the rate-book as the occupier, and since the amount was duly stated as payable by the father, the defendant was neither "rated" nor "assessed." Moreover, even according to the view urged on behalf of the defendant, he was "assessed" and not "rated," and by s. 54 the penalty is imposed upon a person acting as member of a vestry "without being qualified by rating and occupation:" the defendant therefore is liable to be sued in the present action. Secondly, the decision of the inspectors was not conclusive as to the liability of the defendant to the present action. It seems a decisive answer to the argument on his behalf, that if the determination of the inspectors could not be reviewed, s. 54 would only apply where there has been no poll. But in any point of view if, after their decision, the defendant is entitled to act as member of the vestry, s. 54 is cumulative, and he is not exempted from the penalty. Thirdly, the Metropolis Management Act, 1856, s. 4, has no retrospective operation; and even if it has, the qualifying clause therein does not take effect until a default has been committed by the overseers, and here there was no evidence of a default on their part.

(1) 7 Man. & G. 72.

(2) 7 E. & B. 954; S. C. sub nom. *Ex parte Ross*, 26 L. J. (Q.B.) 312.

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Philbrick, Q.C., in reply. If the argument for the plaintiff be correct, the functions of the inspectors will be confined to counting the voting-papers accurately (Metropolis Management Act, 1855, s. 18), to deciding upon the person chosen in case of equality of votes (s. 19), and to delivering to the churchwardens a list of the persons chosen for the purpose of publication (s. 22): it can hardly have been intended by the legislature that their duties should be of so limited a description. The words of s. 54 will be satisfied by applying them only to elections where there has been no poll, and no necessity exists for extending the clause to contested elections. In this manner the statute will receive a reasonable construction, and the inspectors will be left invested with the powers which the legislature evidently intended to confer on them.

BRAMWELL, L.J. I am of opinion that this judgment must be affirmed. The defendant was neither rated nor assessed at the time when the election was held, and therefore he was not capable of acting as vestryman or even of being elected. It is not material to consider whether there is a difference between rating and assessment; but as to this I agree with the argument of the counsel for the plaintiff. Sect. 54 of the Metropolis Management Act, 1855, imposes the penalty upon any person acting as a member of a vestry "without being qualified by rating and occupation as required by this Act." By these words the penalty is incurred merely by acting, whether the person acting as vestryman has or has not been elected: the defendant is subject to that penalty, because he was not qualified by rating, and yet he acted as vestryman. It was argued that if the circumstances mentioned in the Metropolis Management Amendment Act, 1856, s. 4, take place at any time after acting as vestryman, the offence created by s. 54 of the Metropolis Management Act, 1855, will be purged. This argument seems to me wholly unsustainable. The statute enacts that the claim to be rated and the payment or tender of the rate must be made at the office or place of residence of the overseers, and possibly as to this the enactment may be imperative. It is, however, unnecessary to decide this. The statute does not expressly provide what shall be the consequences if the overseers put the name of the claimant upon the rate, but it directs that if

they refuse to do so he shall be in the same position as if his name had been originally inserted in the rate. In one sense this enactment makes the insertion of the name retrospective in its operation; but it is not retrospective so as to create a pardon for penalties already incurred. The effect of the clause is that if the name of the claimant is properly inserted in the rate-book he will not be exposed to any subsequent penalties, but he will still remain liable to penalties previously incurred for acting without qualification. It was further argued that the decision of the inspectors as to the return of the candidates is final. Whatever their jurisdiction may be as to inquiring into the authenticity of the votes tendered, I am satisfied that their decision is not conclusive as to the qualification of the person chosen; their functions only come into play where a poll is demanded. If the vestrymen are chosen without a poll, it is clear that an appeal upon the ground of disqualification will lie, and it would be odd if after a poll no question as to the qualification of the candidates returned could be raised. The inspectors by s. 15 have the opportunity of inquiring into the qualification of the persons presenting themselves as voters; but they have not adequate means of ascertaining whether the candidates are entitled to be elected. If it had been intended that the decision of the inspectors should be final, s. 54 would have contained a clause exempting in express terms from the penalty candidates returned by the inspectors.

BRETT, L.J. The question before us arises principally upon the construction of the Metropolis Management Act, 1855, s. 54. It seems to me that the penalty is incurred by any person, who acts as vestryman without being qualified at the time of acting. It has been argued that the defendant was qualified because he was assessed; this contention depends upon the question, whether assessment is different from rating; but even if it is different, it is plain that the defendant never was before the election "assessed" in respect of the arches; for his name as occupier thereof had not been brought before the overseers, who alone had power to assess him. It was also contended that the defendant became subsequently qualified by force of the Metropolis Management

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Amendment Act, 1856, s. 4, when the demand-note was altered and when he paid the rate as a member of the firm of Williams & Sons. I should be sorry to doubt that a person is qualified as vestryman, if he claims to be rated at one time and at a subsequent time pays or tenders the rate; it would be too strict a construction to hold that the claim and payment or tender must be made at the same time; nevertheless the penalty already incurred was not taken away, for he cannot be said to have been qualified before he actually paid or tendered the rate. I think that a similar rule of construction must be applied to this enactment as to the Parliamentary Registration Acts; under those statutes the question is whether the person claiming to be registered as voter was qualified upon the 31st of July, and it is immaterial to consider whether he becomes qualified afterwards, but before the revising barrister holds his court in September or October. (1) The defendant is not relieved from the penalty by reason of the Metropolis Management Amendment Act, 1856, s. 4; he cannot be deemed to have been qualified upon the 6th of June, when he sat and voted as vestryman. It was also contended that the decision of the inspectors as to the return of the defendant was conclusive. I think it very doubtful whether they have any power to inquire into the qualification of a candidate, and whether their duties are not confined to inquiring into the validity of the ballot papers and to counting the votes; but from any point of view they have no jurisdiction to decide finally and without appeal upon the status of a candidate. The judgment of Manisty, J., was right and must be affirmed.

COTTON, L.J. I am of the same opinion. I need only mention the question as to the functions of the inspectors. Even if there be no mode of appealing from the return made by them, a person acting without qualification remains liable to the penalty. I think that this follows from the clause in the Metropolis Management Act, 1855, s. 54, which provides that the acts and proceedings of the person acting as vestryman "shall, if done previously to the recovery of such penalty, be valid and effectual to all intents

(1) See *Medwin* v. *Streeter*, Law Rep. 4 C. P. 488.

and purposes whatsoever." Therefore, although the acts of an unqualified vestryman prior to the recovery of the penalty cannot be impeached, he is not exempted from the punishment inflicted by the statute.

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Judgment affirmed.

Solicitors for plaintiff: *Bridger & Collins.*
Solicitor for defendant: *R. G. Chipperfield.*

[IN THE COURT OF APPEAL.]

1878
July 2.

BRYANT AND ANOTHER *v.* HERBERT.

Detinue—Costs where Verdict under 20*l.*—*County Court Acts*, 8 & 9 *Vict. c.* 95, *s.* 129; 13 & 14 *Vict. c.* 61, *s.* 11; 30 & 31 *Vict. c.* 142, *s.* 5.

In an action, claiming the return of a picture or its value and damages for its detention, the plaintiffs recovered a verdict of 10*l.*, being its value as assessed by the jury, and 1*s.* damages for its detention:—

Held, reversing the decision of the Common Pleas Division, that the action was founded on tort, within the meaning of 30 & 31 Vict. c. 142, s. 5, and the plaintiffs were entitled to their costs.

11 QBD 16

APPEAL from the judgment of the Common Pleas Division in favour of the defendant. (1)

Action claiming the return of a picture or its value, and damages for its detention. The jury assessed the value of the picture at 10*l.*, and the damages for its detention at 1*s.*

May 30. *Finlay* (*Day, Q.C.*, with him), for the plaintiffs.

H. Matthews, Q.C., and *Bagnall Wild*, for the defendant.

The arguments and cases cited were the same as in the Court below.

Cur. adv. vult.

July 2. The following judgments were delivered.

BRAMWELL, L.J. It seems to me that the question in this case is, what is the meaning of the words "in any action founded on contract," and "on any action founded on tort." Before discussing that, it should be noticed that the statute (2) applies, whether

(1) *Ante*, 189.

(2) By 30 & 31 Vict. c. 142, s. 5, "if in any action, commenced after the passing of this Act, in any of the

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the case is decided by verdict, demurrer, or other means. It seems, therefore, inasmuch as no facts are known when the decision is on demurrer, except those stated on the pleadings, that "founded on contract," or "founded on tort," must mean so founded on the face of the pleadings. If so, there seems to me less difficulty than if the facts of the case are to be considered. But either way what is the meaning of "founded on contract," and "founded on tort?" The words are not words of art even as much as ex contractu or ex delicto would be. They are plain English words, and are to have the meaning ordinary Englishmen would give them. What is the foundation of an action? Those facts which it is necessary to state and prove to maintain it, and no others. This really seems a truism: unless those necessary facts exist, the action is unfounded. All other facts are no part of the foundation. There is a further observation. This statute passed after the Common Law Procedure Acts. They did not abolish forms of action in words. The Common Law Commissioners recommended that: but it was supposed that, if adopted, the law would be shaken to its foundations; so that all that could be done was to provide as far as possible that, though forms of actions remained, there never should be a question what was the form. This was accomplished save as to this very question of costs in actions within the county court jurisdiction. Until the passing of the statute we are discussing, it was necessary to see if an action was assumpsit, case, &c. But the Common Law Procedure Act having passed, and forms of actions being practically abolished, the legislature pass this Act dropping the words "assumpsit, case," &c., and using the words "founded on contract," "founded on tort." This shews to me that the substance of the matter was to be looked at. One may observe there is no middle term; the statute supposes all actions are founded either on contract or on tort. So that it is tort, if not contract, contract if not tort. Then is this action on the face of the

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superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

statements of claim and defence founded on contract or on tort. All that is alleged is that the plaintiffs are owners of the picture, and that the defendant detains it. This means wrongfully detains it, not merely has in his possession, and negatively does not give it up. Then the action is manifestly founded on a tort on the pleadings. But so it is if the facts are looked at. I doubt if there was any contract between the parties. It is said that the defendant agreed to give up the picture. I think not; he was to let the owner take it away; but that is an obligation the law casts on every one who has another's property in his possession. But assuming there was some agreement, the action is not founded on it. Mr. Matthews was driven to contend that it was, and that the property was still in the plaintiffs who could come and seize it or maintain another action for it. This is impossible, and shews therefore that the action was for the tortious detention of the picture, and that the action was founded on the tort to be right of property, and not on any contract. Suppose the plaintiffs had sold the picture to A. B. he might have maintained this action. On what would it then have founded? Clearly not on contract, therefore on tort. So it is now. These are the considerations on which I think this case ought to be decided, and not by inquiries whether detinue is an an action ex contractu or ex delicto. I think that the legislature intended that the substance of the action and not its form should be looked at. It leaves out what was in the former Act, "assumpsit, case," &c., and uses the general words "founded on contract," "founded on tort." But if the old learning as it was called is to be brought to help us, I should come to the same conclusion. No doubt dicta and decisions are to be found that detinue is an action ex contractu or ex quasi contractu, &c., but there are dicta and decisions the other way. It is not easy to make sense of them: perhaps the nature of the thing does not admit of it. It cannot be settled by saying that debt and detinue could be joined, and that actions of tort could not be joined with actions on contract. Actions on contract could not be joined, e.g., debt and assumpsit. The reason being unconnected with the question whether the action was ex contractu or ex delicto. The last case I know of is *Clements* v. *Flight*. (1) This clearly holds

(1) 16 M. & W. 42.

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that the action is founded on a tortious detention. I should therefore come to the same conclusion if these considerations governed the case. But I believe that it was intended that all this useless, and worse than useless, learning should be disregarded, and the matter decided on its substance.

BRETT, L.J. I concur in the judgment of my learned Brother, but I cannot agree with the reasons given. The question is what is the meaning of the words "founded on contract and founded on tort" in s. 5 of 30 & 31 Vict. c. 142. With the greatest deference to my Brother Bramwell I cannot conceive that those words are what he calls plain English, because they seem to me to be technical terms. The conclusion to which I have come is this, that the action of detinue is technically an action founded on contract. The action was invented to avoid the technicalities of the old law: the invention was to state a contract which could not be traversed. Therefore I think the action of detinue, or the form of the action of detinue, so far as the remedy is concerned in its legal signification was founded on contract.

But, then, did the statute which we have to construe mean to use these terms in that sense? I have had great doubts whether it did not, and whether using the terms "founded on contract," or "founded on tort," it was not having regard to the form of action. But I am not prepared to disagree with the conclusion that the statute meant to deal not with the form of action, but with the facts with reference to which the form of action is to be applied. Now, if that be so, the question then is, whether the cause of action in fact here is a cause of action founded on contract in the sense of its being a breach of contract, or whether it is founded on tort in the sense of its being founded on a wrongful act. I certainly have come to a very clear conclusion that where persons are sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, because it may arise and occur when there is no contract, and the remedy sought is not a remedy which arises upon a breach of contract. The real substantial cause of action is a wrongful act, and I am not prepared to say that the statute did not mean when it used the words "founded

on contract," or "founded on tort," founded on breach of contract as distinguished from founded on a wrongful act. If so the action is founded on a wrongful act, and therefore within the meaning of the statute is founded on tort.

My Brother Baggallay agrees in the result at which we have arrived.

Judgment reversed.

Solicitor for plaintiffs: *E. W. Parkes.*

Solicitors for defendant: *Field, Roscoe, Field, & Osbaldiston.*

[IN THE COURT OF APPEAL.]

June 19.

OTTAWAY *v.* HAMILTON.

Costs—Husband and Wife—Necessaries—Extra Costs in a Suit for a Divorce—Divorce Acts, 20 & 21 *Vict. c.* 85, *ss.* 51, 54, *and* 21 & 22 *Vict. c.* 108, *ss.* 13, 14.

A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for "extra costs," i.e., costs reasonably incurred by him beyond the costs taxed and allowed as between party and party.

His common law right to sue the husband as for "necessaries" supplied to the wife, is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts.

THIS was an action brought by the plaintiff, a solicitor who had been employed by the wife of the defendant to institute proceedings against him in the Divorce Division for a divorce on the grounds of adultery and cruelty, to recover against the defendant a balance of costs alleged to have been necessarily incurred on the wife's behalf in the prosecution of those proceedings, but which had been disallowed by the registrar on a taxation as of party and party costs. The facts as proved or admitted on the trial before Denman, J., at the last Michaelmas Sittings in London, are fully detailed in the judgment delivered by the learned judge, hereafter set out, after argument upon a motion for judgment, and it is only necessary to add the following particulars. The plaintiff's bill sued on in this action was made up of the following items: first, charges in respect of business done prior

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and leading up to the institution of the suit; these charges included the costs of taking counsel's opinion and correspondence with the defendant's wife; secondly, charges arising out of proposals for a compromise of the suit in the Divorce Division made by the defendant; thirdly, payments made to a detective for procuring evidence; fourthly, payments in respect of other matters, alleged to be properly chargeable as between solicitor and client.

Feb. 23. *Waddy, Q.C.* (*Wilberforce,* with him), for the plaintiff, contended that all the costs in question were reasonably incurred by the wife, as between solicitor and client, in the prosecution of proceedings, which she had a right to institute as necessary for her protection against her husband. The following authorities were referred to and commented upon: *Turner* v. *Rookes* (1); *Brown* v. *Ackroyd* (2); *Rice* v. *Shepherd* (3); *Wilson* v. *Ford* (4); *Re Hooper* (5); *Dickens* v. *Dickens* (6); *Stocken* v. *Pattrick.* (7)

J. C. Mathew, for the defendant, submitted that these were not costs in respect of which the wife had authority to pledge her husband's credit; that the only costs for which the husband could be liable, at all events since the 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108 (8), were the costs taxable under the decree, provision for which is usually made upon motion as the suit proceeds. He cited *Wells* v. *Wells* (9), *Allen* v. *Allen* (10), and *Bremner* v. *Bremner.* (11)

Cur. adv. vult.

March 5. DENMAN, J. This was an action brought by the plaintiff, a solicitor, for 263*l.* 10*s.* alleged to be due from the defendant under the following circumstances:—In 1875, the plaintiff was retained by the defendant's wife to institute proceedings against the defendant in the Divorce Court, for a divorce

(1) 10 Ad. & E. 47.
(2) 5 E. & B. 819.
(3) 12 C. B. (N.S.) 332.
(4) Law Rep. 3 Ex. 63.
(5) 33 L. J. (Ch.) 300.
(6) 2 Sw. & Tr. 103.
(7) 29 L. T. 507.
(8) He referred to ss. 51 and 54 of the former and to ss. 13 and 14 of the later Act, and also to rules 151–159; see Brown's Divorce Practice, p. 518.
(9) 1 Sw. & Tr. 308.
(10) 2 Sw. & Tr. 107; 30 L. J. (P. & D.) 9.
(11) Law Rep 1 P. & D. 254.

on the grounds of cruelty and adultery. On the 30th of June, 1876, a decree nisi was made for the dissolution of the marriage, which was made absolute on the 23rd of January, 1877. The costs of the wife against the defendant, as between party and party, had been taxed, upon the application of the wife; but the costs for which the plaintiff sued the defendant in this action had been disallowed; and the plaintiff sought to recover them as costs which would be properly allowed as between attorney and client, and, as such, being necessaries supplied to the wife.

It was agreed at the trial that I should reserve judgment upon the facts admitted, and, after argument upon those facts, decide which (if any) of the different classes of costs sought to be recovered are recoverable,—the amount due to be determined by a referee agreed upon, according to the principle laid down by me.

The facts admitted at the trial were as follows:—The first bill of costs sent in by the plaintiff amounted to 544*l.* 1*s.* 11*d.* Of this sum 275*l.* 16*s.* 2*d.* was taxed off, and 269*l.* 5*s.* 9*d.* paid. A supplemental bill was afterwards brought in for 210*l.* 2*s.*, which contained a great number of items for expenses incurred in the payment of detectives and others in obtaining information relating to the acts of adultery alleged to have been committed by the defendant in divers places.

The registrar, being of opinion that he had no power to allow these costs as between party and party, struck his pen through the whole of them in red ink, and taxed the later items of the bill at 53*l.* 18*s.* 6*d.*, upon 88*l.* 11*s.* 10*d.* claimed, and so leaving untaxed, but struck out, items amounting to 112*l.* 10*s.* 2*d.* A third bill was brought in, for costs incurred in the rectification of the settlements after the decree nisi and before decree absolute. This bill was one for 101*l.* 9*s.* 1*d.*, and was taxed down to 74*l.* 16*s.* 6*d.*, and paid. The bill on which the action was brought was for the items struck out without regular taxation in the supplemental bill and for the items taxed off in the first and third bills, and was wholly in respect of work done or payments made before decree absolute.

Soon after the citation, namely, in February, 1876, an order for alimony pendente lite was made for payment at the rate of 188*l.* per annum for the wife and children, commencing from the 6th of December, 1875, the date of citation. This sum was paid up to

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the 6th of February, 1877, when an order to pay permanent alimony was made. On the 25th of July, 1876, a further order for payment of an allowance of 100*l.* per annum for the maintenance of the two younger children was made; and on the 6th of February an order was made to vary the trusts of the settlement and for permanent alimony of 300*l.* a year and 50*l.* for the maintenance of one of the children.

The last item in the bill of costs was dated the 6th of January, 1877.

The plaintiff contended that he was entitled to sue the husband for these costs, as extra costs as between attorney and client, for which a solicitor can sue his client entirely without reference to the amount which may be recovered as between party and party, and that the costs in question were recoverable against the husband as necessaries supplied to the wife. On the other hand, it was argued that the costs in question could not be so recovered, first, on the ground that they had actually been taxed by the proper tribunal and disallowed; secondly, that, at all events, they were the proper subject of taxation in the Divorce Court, and could not be sued for at common law; and thirdly, on the ground that, as to some parts at least, they were not costs incurred in order to obtain necessary protection for the wife, but only in a proceeding for a divorce, as distinguished from a proceeding for her necessary protection.

The case most strongly relied upon for the plaintiff was that of *Stocken* v. *Pattrick* (1), in which a wife having good grounds for instituting a suit for a separation on the ground of cruelty, and her attorney having brought a suit for a divorce on the ground of adultery and cruelty which was ultimately compromised by an agreement for a deed of separation, the solicitor was held entitled to sue for his costs as between attorney and client, including the costs as between attorney and client in the divorce suit.

On the argument I felt considerable doubt whether this case could be looked upon as an authority to the extent that it would authorize the attorney to sue for costs incurred solely in and about the prosecution of that branch of the suit, which went to establish the adultery of the husband; but, upon considering the judgment

(1) 29 L. T. 507.

of the Lord Chief Baron carefully, I think it is an authority to that effect. This and the other cases cited by Mr. Waddy seem to me to go to the full length of establishing that, where the suit is reasonably instituted in the Divorce Court for a divorce or a separation, on the ground of cruelty and adultery, or of cruelty only, then the solicitor can sue the husband for costs as between solicitor and client which he has incurred on behalf of the wife.

I think therefore that the only direction which I can give to the gentleman who has been agreed upon as the referee to settle the amount, if any, due to the plaintiff, is, that he is to be guided by what he considers to have been reasonable or unreasonable in the amount and character of the costs incurred. In considering this question, I do not think that I am warranted by the authorities in telling him to be guided by the fact, that any part of these costs have or have not been allowed as party and party costs in the Divorce Court. To do so would, I think, be to overrule *Brown* v. *Ackroyd* (1), cited for the plaintiff, and *Rice* v. *Shepherd* (2), in both of which it was held that the common law right of the solicitor was not to be limited by the statutable right given under the Divorce Acts. This is also strongly laid down by the Lord Chief Baron in *Stocken* v. *Pattrick* (3), and is in accordance with *Wilson* v. *Ford.* (4)

As pointed out by Mr. Waddy, the plaintiff's rights as against the defendant are not in any way correlative to or limited by the wife's rights as against her husband; and it would be unjust to hold that everything which the registrar of the Divorce Court might hold not to fall within the definition of party and party costs, as adopted in that court, should therefore be held incapable of being recovered as costs between attorney and client, if reasonably and fairly incurred in the prosecution of a proceeding itself reasonably instituted for the protection of the wife. This, I think, is the only test, and by this test the bill must be considered by the referee. If he comes to the conclusion that any of the costs sued for, which have been disallowed by the registrar, are fair and reasonable costs as between attorney and client, he should allow them as to the plaintiff; if any appear to him to be

(1) 5 E. & B. 819.
(2) 12 C. B. (N.S.) 332.
(3) 29 L. T. 507.
(4) Law Rep. 3 Ex. 63.

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unreasonable, he should disallow them; and the judgment will stand for the amount allowed.

Judgment accordingly.

The defendant appealed.

June 18, 19. *J. C. Mathew*, for the defendant, contended, first, that a suit for dissolution of a marriage was not a "necessary" for a wife, which would enable her to pledge her husband's credit; secondly, that under the Divorce Acts the only remedy for costs was to obtain from the Divorce Division an order for payment thereof after taxation; thirdly, that if the remedy by action is concurrent with the right to obtain them by order of the Divorce Division, the plaintiff by submitting his bill for taxation had made an election as to the mode of recovering them which was a bar to the present action.

Wilberforce (*Waddy, Q.C.*, with him), for the plaintiff.

In the course of the argument the following authorities were cited in addition to the cases mentioned before Denman, J.: as to the practice of the Court of Divorce in allowing a wife's costs: *Jones* v. *Jones* (1); *Flower* v. *Flower*. (2) The following statutes and rules were also referred to: as to the power of the Divorce Division to award costs and to order the same to be taxed: 20 & 21 Vict. c. 85, ss. 51, 54; 21 & 22 Vict. c. 108, s. 13; Rules of the Court of Divorce, 151 to 159; as to the power of the Divorce Division to order the rectification of marriage settlements: 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5.

BRAMWELL, L.J. We need not trouble the plaintiff's counsel any further, for we are of opinion that this appeal should be dismissed. It seems to me that a suit for dissolution of a marriage stands upon the same footing as the suit formerly instituted for a divorce à mensa et thoro on the ground of cruelty, or adultery, or both. A suit for a divorce of that kind was primarily a suit for a separation only. Nevertheless, I think that a wife has now the same power of pledging her husband's credit for the costs due to her solicitor in a suit for dissolution of the marriage, as she formerly had for those due to her proctor in a suit in the ecclesi-

(1) Law Rep. 2 P. & D. 333. (2) Law Rep. 3 P. & D. 132.

astical court for a separation. The liability of a husband for his wife's costs in a suit for divorce à mensa et thoro was not denied by the defendant's counsel; but he contended, upon several grounds, that the present action was not maintainable. I cannot agree with his argument. First, I think that a suit for dissolution of the marriage is just as much a "necessary" for a wife as a suit in the ecclesiastical court for divorce à mensa et thoro. Secondly, I do not think that the provisions in the Divorce Acts for the payment of costs were passed in lieu of, or in substitution for, the principle of the common law enabling a wife to pledge her husband's credit. I do not see how those statutes can be said to have taken away that principle; they certainly do not abolish it in express terms, and I do not think that they do so by implication. Suppose a husband were to die after the petition was filed, but before the decree could be pronounced against him, would not the common law liability of his estate for the costs incurred by his wife continue in full force? I therefore think that the power of the wife to pledge her husband's credit remains unimpaired. Thirdly, if the remedies for the recovery of the costs by taxation and action are concurrent, I do not think it an answer to this plaintiff's claim that he has submitted his bills of costs for taxation. There is nothing in the statutes to justify the argument. I cannot see, that because the plaintiff has obtained from the Divorce Division such sums as are allowed upon taxation, he is to be debarred from recovering the extra costs by an action against the husband. If the charges sought to be recovered have been properly incurred, the claim for costs as between solicitor and client in a suit for dissolution of marriage stands in the same plight as the claim for them in an ordinary action. Subject to the question whether they have been justifiably incurred, the defendant is bound to pay them, just as if he had retained the plaintiff to act as his solicitor.

I think it would be unreasonable to hold that the defendant's wife had not power to pledge her husband's credit for the payment of the items relating to matters occurring before the institution of the suit; as they were anterior to the suit, they were not costs in it, and could not be allowed upon taxation; but I think it impossible to say that the plaintiff would be only justified in charging

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one guinea for consultation with the defendant's wife prior to issuing the citation; he was entitled to take the steps necessary to ascertain whether proceedings ought to be commenced. If, therefore, the wife had good ground for applying to the plaintiff, the preliminary charges would be recoverable.

It is very clear that the items as to rectifying the settlement after the decree nisi were part of the costs in the suit. I did feel a doubt whether the defendant's wife had not then become a feme sole, at least so far as to be enabled to pledge her own credit; but upon referring to the Divorce Acts, and upon considering what is their reasonable construction, it seems to me that she does not become an independent person until the decree has been made absolute. (1) The defendant, therefore, is liable to the costs of rectifying the marriage settlement.

BAGGALLAY, L.J. The result of the suit for dissolution of the marriage has shewn that it was necessary for the protection of the wife, and therefore she had authority to pledge her husband's credit for the expenses of the proceedings. I do not think that the principle of law laid down in *Brown* v. *Ackroyd* (2) has been at all trenched upon by the decision in *In re Hooper*. (3) Before the Divorce Acts it was established that a proctor employed by a wife in a suit for a divorce à mensa et thoro properly instituted was entitled to obtain from the husband payment of the costs incurred in the suit; but it has been contended that a different principle must be applied to proceedings under the Divorce Acts, and two points arising upon them have been argued before us: first, whether by creating the power of taxation in the Court of Divorce the legislature has taken away the right to sue in an action for the extra costs; and, secondly, if it has not, whether the plaintiff has not deprived himself of the right to sue by making what may be called an election to take the remedy by taxation. For the reasons assigned by Bramwell, L.J., I think that both those questions should be answered in the plaintiff's favour.

The claim in the present action is of course subject to taxation;

(1) See *Norman* v. *Villars*, 2 Ex. D. 359.

(2) 5 E. & B. 819; 25 L. J. (Q.B.) 193.

(3) 33 L. J. (Ch.) 300.

but it resolves itself into three classes of items. I will first deal with the items incurred after the filing of the petition and before decree nisi. These consist chiefly of expenses connected with the employment of a detective. These have been disallowed upon taxation; but I think them recoverable by the plaintiff from the defendant, if they have been properly incurred. Then as to the charges in respect of matters preliminary to the institution of the suit, it seems to me that the plaintiff's right to them is almost à fortiori to his right to costs after the filing of the petition. Perhaps they were not taxable as part of the costs in the suit; but upon the facts I come to the conclusion that it was necessary to incur them. As to the third class of items, namely, those relating to the rectification of the marriage settlement, they have become payable owing to the adoption of a remedy, which the law conferred upon the defendant's wife. As they were in respect of matters done before the decree absolute, the plaintiff is entitled to recover them.

THESIGER, L.J. I am entirely of the same opinion. It was established that a suit for a separation instituted by a wife upon proper grounds was a "necessary," and that the husband was liable to her proctor for the costs thereof; and I think that upon principle a husband is equally liable for the costs of a suit brought for dissolution of the marriage. A suit for a separation was a "necessary," because a wife stands in need of protection from the cruelty of her husband, and a suit for dissolution is equally a "necessary" when to cruelty is superadded adultery. It may be that in some countries a marriage lawfully contracted cannot be dissolved; but this does not seem to me to be an argument that a suit for dissolution is not a "necessary" within the meaning of that term, as it is understood in our law. It is to be recollected that the word "necessary" in its legal sense, as applied to a wife, merely means something, which it is reasonable that she should enjoy. I now come to the question whether, under the Divorce Acts, taxation is the only remedy, which the wife, or the solicitor appointed by her, has for the recovery of extra costs. If it could have been established that these statutes provide for the taxation of a wife's costs against her husband as between solicitor and client, there

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would have been great force in the argument that the remedy to be adopted is the use of the process of the Divorce Division to obtain payment of them. At all events, the contention would have been well founded that where a wife or a solicitor employed by her applies to the Divorce Division to tax the costs, there would be such an election as to prevent either of them suing subsequently in an action at law. Upon referring to the statutes I do not think that they contain provisions for the taxation of costs as between solicitor and client, so far as the present claim is concerned. By 20 & 21 Vict. c. 85, s. 51, the Court is empowered "on the hearing of any suit, proceeding, or petition," to make such order as to costs as may seem just. These words seem to confer only the power of giving costs as between party and party, and in many cases the jurisdiction of the Court ought to be thus confined, for it has to deal not only with husband and wife but also with other parties, at least where the husband is the petitioner. I do not think that the Rules of Court, which have been mentioned, could under any circumstances go beyond the operation of the statutes; but, further, I think that their very language indicates that the Court has merely the power to give costs as between party and party; and apart from the construction which I put upon the statutes and rules, *Allen* v. *Allen* (1) is a clear authority, for the proposition not only that the ecclesiastical courts used to give costs as between party and party, but also that the Court established by the statutes which I have mentioned has followed a similar principle. It may well be that upon the taxation of costs as between party and party, these courts proceeded upon a more liberal principle than was formerly adopted in the courts of common law; but however that may be, so soon as it is ascertained that upon a suit in the Divorce Division costs are given merely as between party and party, it seems to follow that after giving credit for the sums recovered upon taxation the solicitor for the wife, who is entitled as against her to costs as between solicitor and client, can recover from the husband all the costs, which have been reasonably incurred with respect to the suit. At this result I should have arrived without the assistance of authority; but *Re Hooper* (2), which was the decision of a tribunal having co-ordinate jurisdic-

(1) 2 Sw. & Tr. 107; 30 L. J. (P. M. & A.) 9. (2) 33 L. J. (Ch.) 300.

tion with our own, and *Stocken* v. *Pattrick* (1), entirely support the view which I have taken. I agree with the other members of this Court that the items claimed seem to have been properly charged against the defendant in respect of a suit, which is proved by the result to have been reasonably instituted.

Judgment affirmed.

Plaintiff in person.

Solicitors for defendant: *Mead & Daubeny.*

[IN THE COURT OF APPEAL.]

July 23.

KENDALL AND OTHERS *v.* HAMILTON.

Partnership Debt—Joint and Several Liability—Judgment recovered against one joint Contractor, and relied upon as a defence to a subsequent Action against another joint Contractor.

Before the coming into operation of the Judicature Acts, 1873, 1875, at common law a judgment recovered against one joint contractor was a bar to a subsequent action against any other joint contractor; and in equity, although upon the death of a partner his estate might become subject to a several liability, yet during the lifetime of the partners the legal effect and incidents of a contract entered into by the partnership remained unaltered; and therefore since the coming into operation of the Judicature Acts, 1873, 1875, a contractee, who has obtained judgment against one member of a partnership for breach of a contract entered into by it, cannot maintain an action in respect of the same breach against another member of the partnership.

The defendant was interested in a contract made by the plaintiffs with the firm of W. & Co., and as to the contract was in the position of a dormant partner with respect to that firm. The plaintiffs obtained judgments against the members of the firm of W. & Co. other than the defendant in respect of breaches of that contract, and after the coming into operation of the Judicature Acts, 1873, 1875, commenced the present action against the defendant alone for certain sums of money, which were included in the judgments obtained by them against the firm of W. & Co.:—

Held, that the cause of action against the defendant was merged in the judgments obtained against the members of the firm of W. & Co., and that the present action was not maintainable.

ACTION to recover 38,672*l.* as damages for breach of contract by the firm of Wilson, McLay, & Co., whereof the defendant was

(1) 29 L. T. (N.S.) 507.

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alleged to be a partner, and also as money payable for money paid, for money lent, for money received for the use of the plaintiffs, and for interest. The writ was issued on the 5th of July, 1877. Amongst other grounds of defence the defendant alleged that the firm of Wilson, McLay, & Co. was composed of M. Wilson and J. C. S. McLay, and that after the alleged causes of action had accrued, the plaintiffs sued M. Wilson and J. C. S. McLay, and recovered judgments against them in respect thereof. The defendant also alleged that after the recovery of the judgments Wilson and McLay became bankrupts in pursuance of the law of Scotland, and the plaintiffs proved against their estate in respect of the judgments, and that their proof was allowed, and that they received a dividend in respect of it.

The action came on for trial before Huddleston, B., without a jury, and the learned judge directed judgment to be entered for the plaintiffs. The facts of the case are stated in the judgment hereinafter set forth.

The defendant appealed.

June 4, 5, 6, 7. *Watkin Williams, Q.C.*, and *C. Bowen*, for the plaintiffs.

Benjamin, Q.C., and *Rigby*, for the defendant.

The arguments are sufficiently noticed in the judgment delivered in this court. The following authorities were cited:—as to whether the defendant could be made liable as a dormant partner, after judgment had been obtained against the ostensible partners of the firm of Wilson, McLay, & Co.: *De Mautort* v. *Saunders* (1); *Bonfield* v. *Smith* (2); as to the effect of a judgment in merging the original debt: *Ex parte Waterfall* (3); *Ex parte Higgins* (4); as to the effect of a contract made by some of the partners on behalf of all the partners: *MacLae* v. *Sutherland* (5); that a contract by partners is several as well as joint: *Lane* v. *Williams* (6); *Bishop* v. *Church* (7); *Rice* v. *Shute* (8); *Richards* v. *Heather* (9); *Ex parte Thornton* (10); as

(1) 1 B. & Ad. 398.
(2) 12 M. & W. 405.
(3) 4 De G. & Sm. 199.
(4) 3 De G. & J. 33.
(5) 3 E. & B. 1.
(6) 2 Vern. 277, 292.
(7) 2 Ves., Sen. 100, 371.
(8) 5 Burr. 2611.
(9) 1 B. & Ald. 29.
(10) 3 De G. & J. 454.

to the liability of the estate of a deceased partner: *Gray* v. *Chiswell* (1); *Lodge* v. *Prichard* (2); that the construction of a covenant by partners was the same in equity as at law: *Wilmer* v. *Currey* (3); *Sumner* v. *Powell.* (4)

Cur. adv. vult.

July 23. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was delivered by

COTTON, L.J. This was an appeal from a decision of Huddleston, B., who, after trying the case without a jury, gave judgment in favour of the plaintiffs. The action was to recover a sum of money alleged to be due to the plaintiffs under a contract made by them with the defendant. The contract, on which the action was founded, was in fact made by the firm of Wilson, McLay, & Co. In that firm the defendant was not a partner; he was, however, jointly interested with the firm of Wilson, McLay, & Co., in certain adventures, in respect of which the contract sued upon was made. But his connection with them in the matter was not known to the plaintiffs till long after the time, at which the contract sued upon was made. He was, as regards his liability to the plaintiffs, in the position of a dormant partner. In the month of April, 1874, after the claim which is the subject of this action had arisen, there was a meeting between the plaintiffs and the partners in the firm of Messrs. Wilson, McLay, & Co., or some of them, at which the defendant was present, and, in our opinion, the fair result of the evidence is that the plaintiffs then learned that the defendant had an interest in the contract sued on. The plaintiffs claim that a large sum was due to them under that contract, and in August, 1874, they obtained judgment on the contract against the members of the firm of Messrs. Wilson, McLay, & Co. for a considerable sum, and afterwards, in the month of September in the same year, for a further sum. The sums covered by these judgments included what is sought to be recovered in the present action. In the following year Messrs. Wilson, McLay, & Co became bankrupts in Scotland, and the plaintiffs proved against their estate. The appellant relied on what took place in or with

(1) 9 Ves. 118.
(2) 1 De G. J. & S. 610.
(3) 2 De G. & Sm. 347.
(4) 2 Mer. 30.

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reference to the Scotch bankruptcy or sequestration as an answer to the plaintiffs' action. Afterwards, that is to say, in the month of July, 1877, the plaintiffs commenced this action against the defendant Hamilton alone, and after hearing the case, Huddleston, B., gave judgment in favour of the plaintiffs.

The defendant appealed, and the point principally relied upon by his counsel was the effect of the judgments obtained by the plaintiffs against the persons constituting the firm of Wilson, McLay, & Co. It was contended that the contract, on which the plaintiffs are now suing, was the joint contract of the defendant and those persons, and that the judgments recovered against some of the joint contractors are a bar to an action against the other co-contractor, on the ground that the original cause of action is merged in the superior obligation of the judgments. It was contended, on the part of the plaintiffs, that even at law this was not the effect of the judgments. We are of opinion that this contention on behalf of the plaintiffs cannot be maintained, and that at law the judgments obtained against Wilson, McLay, & Co. would be a bar to the action: see *King* v. *Hoare*. (1)

The plaintiffs, however, also contended that whatever might be the effect at common law of the judgments, every partnership contract is in equity several as well as joint, that the High Court is now a court of law and equity, and that the Court, having regard to the rules of equity, is bound to hold that the plaintiffs can sue the defendant as on a several contract, and are not barred by the judgments recovered in the actions against the other parties interested in the joint adventure. And it was on this ground that Huddleston, B., decided in favour of the plaintiffs. There is no doubt that the judgments referred to will not bar the present action, if the contract entered into by Wilson, McLay, & Co. on behalf of themselves and the defendant is to be considered several as well as joint. The plaintiffs, in support of their proposition that the contract is several as well as joint, have relied on a long series of cases in the Court of Chancery, in which, in administering the estate of a partner who died leaving partners or a partner him surviving, the Court has admitted the creditors of the partnership to prove against the estate of the deceased partner,

(1) 13 M. & W. 494.

though at law the survivor was alone liable, and, though it was originally doubted whether this could be done, has even allowed partnership creditors to institute proceedings for the purpose of obtaining administration of the estate of the deceased partner and payment out of his assets. It was contended that these authorities are founded on and establish the principle, that in equity every partnership contract is several as well as joint; and in support of this view the plaintiffs refer to expressions used by Sir William Grant in *De Vaynes* v. *Noble* (1), and by Sir John Leach in *Wilkinson* v. *Henderson* (2), which state in general terms that in equity a partnership contract is several as well as joint; and they also refer to similar expressions used by the present Master of the Rolls in the case of *Beresford* v. *Browning*. (3) It is now well established that a court of equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor.

There is however no case in which the point now to be decided has ever arisen, and the question is whether the decisions, to which we have referred, do establish a principle, which supports the plaintiffs' contention in the present action. It is difficult to understand how the Court of Chancery came to interfere with the legal liability of partners, and although it has done so, it has, in giving the partnership creditor relief, dealt with him in an anomalous way, that is to say, except in cases where there has been no joint estate, the Court has only admitted the partnership creditors to rank against the estate of the deceased, after all his private or separate debts have been paid. This is not consistent with the view that the contract of the deceased with these creditors is several as well as joint. Lord Eldon does not seem to have considered that the relief thus given to the partnership creditor was to be considered as establishing a principle, that in equity a partnership contract is for all purposes or in the lifetime of the co-contractors to be considered several as well as joint; for

(1) 1 Mer. (*Sleech's Case*), at p. 564. (2) 1 My. & K. at p. 588.
(3) Law Rep. 20 Eq. at p. 573.

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in *Ex parte Kendall* (1) he says: "Upon the authority referred to and others, where parties think proper to enter into a joint instead of a joint and several contract, though I am surprised that courts of equity have not left that to its fate as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased, if the survivors cannot pay." And in *Beresford* v. *Browning* (2) Lord Justice James says that the more accurate mode of expressing the rule applicable to partnership contracts is, "that so far as regards partners where there is in equity no survivorship of property, there is in equity no survivorship of liability." It must also be remembered that the Court of Bankruptcy is a court of equity as well as of law, and that in bankruptcy a partnership creditor is not, where there are any joint assets, entitled to prove against the separate estate in competition with the separate creditors, but can only obtain payment out of the separate assets, when all the separate creditors are paid. This affords a strong argument in favour of the view that the decisions in equity, on which the plaintiffs rely, do not establish the proposition, that partnership contracts are for all purposes to be treated as several as well as joint. With the exception of those cases, where relief has been given in equity against partners for breaches of trust or other torts (where the relief is always several as well as joint), courts of equity have given relief in respect of partnership contracts, when in consequence of the contract being at law joint only there has been no remedy at law, only where the claims have been against the estate of a partner who has died leaving others him surviving. In our opinion, instead of holding that these cases establish the principle that all partnership or mercantile contracts are for all purposes several as well as joint, it is more correct to say that relief was originally given in these cases as a consequence, which equity attributed to the rule, Jus accrescendi inter mercatores locum non habet, namely, that as the estate of the deceased notwithstanding his death retained an interest in the partnership property, his estate ought not to be protected or relieved by his death from liability in respect of contracts of which it still retained the benefit, and that to this extent partnership contracts were to be considered

(1) 17 Ves. 519.

(2) 1 Ch. D. 30, at p. 34.

several; or, in other words, that in partnership contracts, of which the profit does not go exclusively to the survivors, there is in the view of a court of equity an implied stipulation that in the event of the death of any of the contractors his estate shall still remain liable, and that in this way the estate of each partner is in equity severally liable. This is probably the explanation of what is said by Lord Eldon in *Ex parte Kendall* (1): "Without going through all the authorities and repeating Lord Thurlow's doubt in *Hoare* v. *Contencin* (2), and my own surprise, that a court of equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand." Whether or no the courts of equity were right in thus interfering with the legal effect of partnership contracts, it is well established that relief will be given against the estate of a deceased partner; but in our opinion the cases in which this relief has been given cannot be considered as establishing, that partnership contracts are to be considered several for all purposes, and so as to alter during the lifetime of the parties the effect and incidents of the contracts. In our opinion the expressions used by the learned judges above referred to must be understood with reference to the cases in which they are used, and as stating either that as regards the estate of a deceased partner the contract must be treated as several, or as shortly though somewhat inaccurately stating the effect which a court of equity after the death of one of several partners gives to these contracts. It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of the *Liverpool Borough Bank* v. *Walker* (3) and *Jacomb* v. *Harwood* (4), as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of these cases the judgment was not recovered

(1) 17 Ves. 525.
(2) 1 Bro. C. C. 27.
(3) 4 De G. & J. 24.
(4) 2 Ves. Sen. 265.

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until after the death of the partner, against whose estate the creditor was seeking relief; and the cases, in which relief has been given in equity against the estate of a deceased partner, certainly establish that from and after his death his estate is subject to a separate or several liability. This does not establish that a partnership contract in its inception or during the lives of all the co-contractors is several as well as joint. In our opinion, the cases relied on do not establish any principle, which entitles the plaintiffs to be relieved from the legal effect of the judgments obtained by them against the defendant's co-contractors, Messrs. Wilson, McLay, & Co., and we hold that these judgments are a bar to the present action.

The appeal must be allowed, and the judgment of the Court below reversed with costs, including the costs of the appeal.

Judgment reversed.

Solicitors for plaintiffs: *Freshfields & Williams.*
Solicitor for defendant: *John W. Sykes.*

July 3.

HAYN, ROMAN, & CO. *v.* CULLIFORD & CLARK.

Ship—Bill of Lading—Signed by Charterers—Agents for Owners—Excepted Perils—Negligent Stowage—Liability of Owners.

4 C.P.D. 184

Bags of sugar, shipped by the plaintiffs, were carried in the defendants' steamship from Hamburg to London at an agreed freight. The vessel was chartered for the voyage by P. & K., but the plaintiffs had no knowledge of the charter. The plaintiffs received a bill of lading by the terms of which the sugar was to be delivered in good order, the usual perils and "all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, and it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee." This bill of lading was signed "P. & K., agents." It is a custom in the case of steamships for the brokers, and not the master, to sign the bills of lading.

Oxide of zinc in casks was negligently stowed above the sugar and consequently damaged it. In an action for the damage, the Court, being empowered to decide

questions of fact, and finding that the bill of lading was signed by P. & K., as agents for the defendants and with their authority:—

Held, that the defendants were bound, and even assuming the absence of such actual authority would have been, under the circumstances, bound by the bill of lading; that the damage from negligent stowage was not within the exceptive clause; and that, therefore, the plaintiffs were entitled to recover.

FURTHER CONSIDERATION. The case was tried and argued before Denman, J.

The pleadings, facts, and arguments are sufficiently set forth in the judgment.

June 18, 22. *Butt, Q.C.*, and *J. C. Mathew*, for the plaintiffs. [They cited, in addition to the authorities mentioned by the Court: *Schuster* v. *McKellar* (1); Maclachlan on Shipping, 2nd ed. p. 366; Abbott on Shipping, 11th ed. p. 307; 1 Parsons on Shipping, p. 185; *Fletcher* v. *Rylands* (2); *Jones* v. *Festiniog Ry. Co.* (3); *Alston* v. *Herring* (4); *Brass* v. *Maitland* (5); *Ohrloff* v. *Briscall* (6); *Steel* v. *State Line Steamship Co.* (7); *Blaikie* v. *Stembridge*. (8)]

Watkin Williams, Q.C., and *C. Bowen*, for the defendants. [They referred to the following additional cases: *Mitcheson* v. *Oliver* (9); *Murray* v. *Currie* (10); *British Columbia Saw Mill Co.* v. *Nettleship*. (11)]

July 3. DENMAN, J., delivered judgment as follows:—

The plaintiffs in their statement of claim alleged that they delivered to the defendants 280 bags of sugar in good condition, to be carried by the defendants' steamship *Cleanthes* from Hamburg to London for agreed freight, upon the terms of a bill of lading by which the goods were to be delivered in like condition, certain perils only excepted (by which perils it was alleged delivery in good condition was not prevented); that the defendants did not deliver the goods in good condition, but damaged and unmerchantable; and that such damage was caused by the sugar

(1) 7 E. & B. 704; 26 L. J. (Q.B.) 281.
(2) Law Rep. 3 H. L. 330.
(3) Law Rep. 3 Q. B. 733.
(4) 11 Ex. 822.
(5) 6 E. & B. 470; 26 L. J. (Q.B.) 49.
(6) Law Rep. 1 P. C. App. 231.
(7) 3 App. Cas. 72.
(8) 6 C. B. (N.S.) 894; 28 L. J. (C.P.) 329.
(9) 5 E. & B. 419.
(10) Law Rep. 6 C. P. 24 at p. 27.
(11) Law Rep. 3 C. P. 499.

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becoming tainted with oxide of zinc, owing to the improper and negligent stowing of their goods and the cargo.

The defence, so far as it is material to the questions remaining for my decision, was as follows:—That the ship was before the time mentioned in the statement of claim chartered for a voyage from Hamburg to London under a charterparty by which it was agreed that the ship should be under the control of the charterers, and that the master of the ship should act as the servant and agent of the charterers for the purpose of signing bills of lading, and not as servant or agent of the defendants; that, in pursuance of the charterparty, a cargo shipped by different shippers, including the 280 bags shipped under the bill of lading mentioned in the statement of claim was taken on board; that the goods were not delivered to the defendants, but to the charterers or the master as their servant or agent, and not otherwise; that the shippers of the sugar and the plaintiffs had notice of the charterparty, and that the master was servant and agent of the charterers to sign bills of lading, and not servant or agent of the defendants; that the bill of lading contained a clause by which the defendants would not be liable for the damage complained of, even if bound by the bill of lading; and that the damage, if any, and the delivery in bad condition, were acts and defaults for which the charterers and not the defendants were responsible.

The charterparty, which was put in at the trial, was dated the 15th of November, 1877, and was made between the defendants, "owners of the steamship *Cleanthes*," and "Messrs. Pott & Korner, merchants, by the intercession of the ship-broker W. Zoder," and bound the ship, after discharging her inward cargo, to load from the said merchant, a full and complete cargo of general lawful merchandize, and proceed to one wharf only in London, as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7*s.* 6*d.* sterling, in full, per ton, gross weight delivered; "it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owner shall have an absolute lien . . . on said cargo, which lien they shall be bound to exercise: the charterers' liability to cease when cargo is shipped and bills of lading signed: the captain shall sign bills of lading at rates as presented, without prejudice to this charter-

party." The charterparty was signed by "H. W. Pott & Korner," and "By telegraphic authority of Owners, W. Zoder, as agent."

Alphonse Roman, one of the plaintiffs, who was examined at the trial, swore that his firm had no knowledge of the existence of a charter until the 10th of December, after a claim had been made upon the defendants for the damage for which this action was brought.

The plaintiffs bought the sugar in November, and received the bill of lading after paying for it, and gave the bill of lading to Messrs. Middleton, wharfingers, who took the bill of lading and got delivery from the ship. The freight at the bill of lading rate was paid to one Watkins who, according to an answer to one of the interrogatories administered by the plaintiffs to the defendants, "acted as broker for the ship in London." Watkins received the freight, and gave a receipt to the plaintiffs headed "Freight per *Cleanthes*," and signed "Received for the owners."

It was admitted at the trial that the sugar was damaged by improper stowage; but there was no evidence as to the employment or otherwise of a stevedore, except that in the answers to interrogatories the defendants said they believed that the cargo was stowed by a stevedore employed by Zobel, who was the agent of the ship at Hamburg, at the expense of the ship.

A letter was read at the trial, of the 4th of December, 1877, in which the defendants' firm in London wrote to the same firm at Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain," expressing a hope that the amount of damage might turn out to have been exaggerated, and containing this passage, "Watkins will no doubt, make best of case for steamer: but, why the captain stowed poison in casks on top of sugar in bags it is difficult to understand and may prove serious to him."

On the 5th of December the plaintiffs wrote to Watkins and to the defendants, informing them of the damage, and inclosing their claim for the full value of the sugar as being rendered totally worthless. On the 6th Watkins wrote denying that there was any proof of the sugar being damaged or totally spoilt, and adding that, "if damaged, no doubt it was by perils of the sea." On the 10th of December Watkins, by the desire of the defendants, referred the plaintiffs to the charterers.

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Evidence was given at the trial, and admitted subject to objection, that in the case of steamships, it is uniformly the custom for the broker of the ship, and not the master, to sign the bills of lading. The witnesses who proved this usage said, on cross-examination, that the brokers frequently charter the ship, and, when they sign bills of lading for chartered ships, sign them for the owner or for the charterer, according to the authority they may have; and, on re-examination, said that, if they are themselves the charterers, they would sign it in their own name.

The bill of lading relied upon by the plaintiffs was objected to by the defendants' counsel as evidence in the cause, on the ground that it was signed by Pott & Korner, agents, and that there was no evidence of any authority to them to sign it on behalf of the ship-owners. I admitted it subject to objection; and it was, I think, admissible in evidence, if on no other ground, because it was referred to in the pleadings, and not denied to exist; on the contrary, it was in part set out by the defendants in order to raise one of their defences. The question of course was still open to the defendants whether it was binding upon them, and whether, if binding, it exempted them from liability.

The question then arises, was there, under the circumstances of the case, any contract between the plaintiffs and the defendants for the carriage of the goods in question, or was this a contract with the charterers Pott & Korner.

It was submitted, on behalf of the defendants, that the very form of the bill of lading, coupled with the fact that Pott & Korner had in fact a charter on the ship, was conclusive against any liability on the ship-owners.

The bill of lading, omitting the exceptive clause, on which the second contention of the defendants depends, was as follows:—"Shipped in good order and well conditioned in and upon the good steamship *Cleanthes*, whereof is master P. Andrews, now lying at Hamburg and bound for London, 280 bags, &c., which are to be delivered in like good order to Hayn, Roman, & Co. (the plaintiffs) or their assigns, freight at the rate of 7*s.* 6*d.* sterling, + 10 per cent., per ton gross weight, to be paid by consignees. In witness whereof the master or agent of the said ship has signed four bills of lading of this tenor and date, &c. Dated in Hamburg, this 19th day of November, 1877: Pott & Korner, agents."

It was contended that, inasmuch as Pott & Korner were in fact the charterers, whether on their own behalf or on behalf of other persons unknown, it ought to be presumed, in the absence of any express evidence of authority to sign the particular bill of lading on behalf of the ship-owners, that it was signed by them on their own behalf and not on behalf of the defendants, and that, so far as this was a question of fact, I ought so to find.

It was agreed at the trial that, except so far as the question of damages was concerned, all questions of fact and inferences of fact arising upon or to be drawn from the evidence were to be disposed of by me or by any Court before whom the case may come.

Looking at all the facts of the case, I am of opinion that the bill of lading was in fact signed by Pott & Korner not on their own behalf but as agents for the shipowners and with their authority, and that it is on that ground a document binding upon the ship-owners, the defendants. I think it impossible to doubt that the defendants knew that bills of lading were to be signed and had been signed on their behalf by Pott & Korner, and only repudiated the bill of lading in question after they knew that a heavy claim had arisen upon it. The letters and telegrams put in at the trial and upon the argument seem to me to establish beyond all doubt that the bill of lading was their contract with the plaintiffs as shippers or consignees of the goods.

This renders it unnecessary to consider minutely the other two grounds upon which the plaintiffs contended that the defendants would be liable, even if the bill of lading was not binding upon them as a document signed with their actual authority. I think that, even in that case, there would have been strong reason for holding that the defendants were liable.

The result of the able and elaborate argument before me was, to convince me that, under circumstances such as those of the present case, the defendants would be responsible, upon the principles explained in *Sack* v. *Ford* (1), *Sandeman* v. *Scurr* (2), *The St. Cloud* (3), and *Gilkison* v. *Middleton.* (4)

The plaintiffs in the present case had no notice whatever of any

(1) 13 C. B. (N.S.) 90; 32 L. J. (C.P.) 12.

(2) Law Rep. 2 Q. B. 86.

(3) Br. & Lush. 4.

(4) 2 C. B. (N.S.) 134; 26 L. J. (C.P.) 209.

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charterparty until after the damage. The bill of lading, though not signed by the master, was signed by persons purporting to act for the defendants: there was nothing calling the attention of the plaintiffs to look to any one save the master or ship-owners to perform that which is the primâ facie duty of the master and ship-owner, viz. to stow the goods safely. Under the circumstances I think that, that duty having been negligently discharged, especially where it was discharged in so palpably negligent a manner as that described in the defendants' letter of the 4th of December, it is clear that an action would lie against the ship-owners, and that the ship-owners would be estopped from relying upon a charterparty of which the plaintiffs had no notice, for any purpose: see per M. R., *Peek* v. *Larsen.* (1) The authorities and text-books are all uniformly to the effect that, subject to any stipulations to the contrary in the bills of lading, and in the absence of any notice of a charter, one of the primary duties of the master is to stow the goods carefully. This appears to me to be a duty arising upon the mere receipt of the goods for the purpose of carriage, and to be one which it would require an express contract to supersede or excuse.

Holding, however, as I do, that the bill of lading is binding between the parties as having been actually signed with the authority of the defendants, it becomes necessary to consider another point made by the defendants, viz. that by the terms of the bill of lading itself they are exempt from liability for the damage in question.

This turns upon the true construction of the exceptive clause in the bill of lading, the material parts of which are as follows:— "The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned, from machinery, boilers, steam and steam navigation, or from perils of the seas or rivers, *or from any act, neglect, or default whatsoever of the pilot, master, or mariners, in navigating the ship;* the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed *that the captain, officers, and crew*

(1) Law Rep. 12 Eq. 378.

of the vessel in the transmission of the goods, as betweeen the shipper, owner, or consignee thereof and the ship and ship-owner, be considered the servants of such shipper, owner, or consignee."

The defendants in their statement of defence set out the above clause, and alleged that, if the goods were not delivered in good condition, it was owing to "the acts, neglects, or defaults of the pilot, master, or mariners *in navigating the ship*." It was contended for the defendants that the word "transmission" in the above clause was never more extensive than the word "navigating," and that it included everything to be done with the goods from the receipt of them from the hands of the consignor to their arrival at their destination: and *Good* v. *London Steam Ship-Owners Association* (1) was relied on, in which it was held that an injury which happened to a ship moored at a quay where she was lying, having put back to coal, and which injury was owing to the negligent leaving open of a sea-cock, was "damage caused by reason of improper navigation," within the meaning of a deed by which an association of ship-owners agreed to indemnify each other against "loss or damage which by reason of the improper navigation of any such ship may be caused to any goods on board." In that case Willes, J., said (2): "Improper navigation, within the meaning of this deed, is, something improperly done .... in the course of the voyage." I do not think that the case assists the decision of that before me, beyond being an authority for the proposition that the ship need not be in a state of motion in order to be in a state of navigation, within the meaning of that word as used in the deed there in question. Other cases have decided that the word "navigation" for some purposes includes a period when the ship is not in motion; as, for instance, when she is at anchor. But I do not think that these cases have any strong bearing upon the question how the words "navigating the ship," and "transmission of the goods," ought to be construed in a clause such as the present.

The contention for the plaintiffs was, that the words "in transmission of the goods," if operative at all, had a limiting effect upon the alleged generality of the previous words, and confined their application to a period subsequent to the period at which

(1) Law Rep. 6 C. P. 563. (2) At p. 569.

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locomotion in the ship should commence; and they cited *Czech* v. *General Navigation Co.* (1) as shewing that the tendency of the Courts was strong to require clear affirmative proof on the part of the ship-owner to enable him to claim exemption under exceptive clauses such as the present, and also the case of *Taylor* v. *Liverpool and Great Western Steam Co.* (2), in which Lush, J., uses this expression: "The word is ambiguous, and, being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed." I am of opinion that the contention of the plaintiffs on this point ought to prevail. Though it may be quite correct to say that, for many purposes, negligent stowage is a portion of negligent navigation, and though in the case of *Good* v. *London Steamship Owners Association* (3), in answer to an observation of counsel, "Would damage arising from negligent stowage be within this deed?" Willes, J., answered, "Certainly; unless in a port where stevedores are employed" I do not think it follows that, in the case of an exceptive clause such as that now in question, the words "in navigating the ship," or "in transmission of the goods," include "stowage." On the contrary, I think that, applying the principle laid down by Lush, J., in *Taylor* v. *Liverpool and Great Western Steam Co.*, mentioned above, which I think ought to be applied in such cases, and considering how easy it would have been to use apt words to exempt the shipowners from liability for improper stowage, it is more reasonable to hold that the case of negligent stowage is not included under the words relied upon than that it is included.

I therefore think that the plaintiffs are entitled to judgment for the sum assessed by the jury—501*l.* 6*s.*—and I give judgment accordingly for that amount and costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Hollams, Son, & Coward.*

(1) Law Rep. 3 C. P. 14. (2) Law Rep. 9 Q. B. 546, 549.
(3) Law Rep. 6 C. P. at p. 569.

CAUGHEY *v.* JAMES GORDON & CO.

1878
May 10.

Shipping—Charterparty—Primage.

By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60*s.* per ton *in full*; ship paying all port-charges, pilotages, and towages: the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing.

The master (who was paid a fixed salary, "to include all charges and allowances,") signed a bill of lading for the whole cargo making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, *with 5 per cent. primage in cash on delivery as customary.*"

The cargo was received at the port of discharge by the defendants, the indorsees of the bill of lading, as agents of the charterer, and the freight paid:—

Held, that the defendants were not liable for primage.

APPEAL from the County Court of Lancashire holden at Liverpool.

The action was brought to recover 49*l.* 18*s.* 1*d.* As regards 8*l.*, a claim for demurrage, the question was one purely of fact, and the judge decided in favour of the defendants. As to the balance, 41*l.* 18*s.* 1*d.*, which was a claim for primage, the facts proved or admitted at the hearing were as follows:—

The plaintiff is the master of the British ship *San Juan:* the defendants are a firm of merchants in Liverpool.

On the 28th of April, 1877, the *San Juan* was chartered at Melbourne by her owner, Mr. T. Riley, to Messrs. H. Wilke & Co., merchants at Port Adelaide. By the charterparty the ship was to proceed to Port M'Donnell, and there load from the charterers or their agents a full cargo of bark . . . and proceed to either Falmouth or Cork for orders to proceed to a safe port in the United Kingdom, and there deliver the same, as ordered by the charterers or their agents, on being paid freight 60*s.* per ton of 2240 lbs. gross weight in full; ship paying all port charges, pilotages, and towages: the freight to be paid in cash on right and true delivery of cargo at port of discharge, less any advances that may have

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been made. The captain to sign bills of lading for cargo as presented at any rate of freight required by charterers or their agents, without prejudice to the charterparty; but, should the total freight by bills of lading amount to less than total chartered freight, the difference to be paid to the master in cash before sailing.

7. The vessel proceeded to Port M'Donnell (her port of loading), where a cargo was duly loaded; and she proceeded on the chartered voyage on the 6th of June, 1877.

8. A bill of lading was tendered by the charterers to the plaintiff for signature, and was signed by him and given to the charterers before the ship sailed. By the bill of lading the goods were made deliverable at the port of discharge "unto order or his or their assigns, average as accustomed freight for the said goods to be paid in cash at port of discharge, at the rate of discharge, rate of freight, and other conditions as per charterparty, *with* 5 *per cent. primage in cash on delivery, as customary.*"

9. The *San Juan* was ordered to Liverpool, and, after her arrival there, the defendants presented to the ship's agents the bill of lading for the cargo, and obtained a delivery-order from the ship's agents, and thereupon the cargo was delivered to them.

The judge found as a fact which he inferred from the documents and circumstances that the contract between the parties was upon the terms contained in the bill of lading. The defendants contended and contend so far as may be necessary, that there was no evidence to justify this inference, and that the judge's finding was not in law justifiable.

10. The charterparty and also the bill of lading had been previously transmitted to the defendants. The bill of lading had been indorsed by the charterers in blank and sent to Messrs. D. & W. Murray, their London agents, who had handed it to Messrs. Devitt & Hett, Messrs. Murray's London brokers. Messrs. Devitt & Hett indorsed it to Messrs. Hett, Yarrow, & Co., and they, as they were unable themselves to act in the matter, indorsed it to the defendants, who undertook to act for the charterers, as above mentioned. None of the parties to whom the bill of lading was indorsed as aforesaid had any interest in the cargo other than as agents of the shippers, who were the charterers of the vessel. The defendants took delivery of the cargo as agents of the charterers. There was

no evidence that the plaintiff had any knowledge at the time of such delivery that the defendants were acting as agents of the charterers, or that they had no interest in the cargo other than as such agents, or of the circumstances under which or purposes for which the several indorsements were made, or that the charterparty had been transmitted to the defendants as aforesaid.

11. The defendants upon the right delivery of the cargo duly paid the plaintiff the freight as per charterparty, after deducting 505*l.* 17*s.* 6*d.* in respect of the advances, with exchange and commission. The plaintiff further claimed from the defendants 41*l.* 18*s.* 1*d.* for primage, which the defendants refused to pay.

12. A ship-broker called by the defendants, deposed that the captain's salary now customarily includes all gratuities, such as primage, &c.

13. It was admitted, on the part of the plaintiff, that, by the terms of his agreement with the owner of the ship, the plaintiff as master received a fixed salary, which was to include all charges and allowances; and that, if he recovered the 41*l.* 18*s.* 1*d.*, he would be obliged thereunder to pay over or account for the same to the owner. It was admitted, on the part of the defendants, that, if the plaintiff was entitled to primage, the amount to which he was so entitled was 41*l.* 18*s.* 1*d.*

14. Upon this state of facts, the plaintiff claimed payment of the primage upon the terms of the bill of lading. The defendants, on the other hand, contended that the contract which ascertained and governed the rights of the plaintiff as master and the defendants (taking delivery of cargo as agents or brokers for the charterers) was the charterparty; that, under the charterparty, they were not liable to pay the sum claimed as primage in addition to the chartered freight; that the charterparty expressly stipulated for a delivery of the cargo upon payment of freight at a certain rate "in full;" and that, having paid the freight as per charterparty, they were not bound by the bill of lading, as contended by the plaintiff, to pay the charge for primage.

15. The judge held that the plaintiff was entitled to the primage, and directed judgment to be entered for him for 41*l.* 18*s.* 1*d.*

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The question for the opinion of the Court was, whether the plaintiff was entitled to recover the amount claimed for primage.

Cohen, Q.C., (*J. C. Mathew* with him), for the defendants. The defendants, who received the cargo as agents of the charterer, and not under the bill of lading, can only be liable to the extent to which the charterer himself would be liable, that is, to the extent of the stipulated freight. The master, having by his arrangement with his owners precluded himself from claiming primage on his own account, cannot sue for it on his owner's account, when the owner by his contract with the charterers is himself estopped from claiming it. In *Best* v. *Saunders* (1) there was no charterparty, and therefore the assignees of the bill of lading were held liable upon the stipulation contained therein. The document which governs the rights of the parties here is the charterparty, not the bill of lading. The master signed the bill of lading as agent of the charterer, not to fix his rights, but to enable him to transfer the goods.

[LORD COLERIDGE, C.J., referred to *Charleton* v. *Cotesworth* (2).]

There the owners had received the primage, and there was no contract between them and the master which disentitled the latter to claim it. In Abbott on Shipping, 11th ed. 361, it is laid down that, "if by the contract between the owner and the master, the master is not to receive primage, he can maintain no action for it." By the terms of this charterparty, the charterers or their agents are to have delivery of the cargo on payment of freight at 60*s.* per ton *in full.*

No counsel appeared for the plaintiff.

LORD COLERIDGE, C.J. I am of opinion that the defendants are entitled to judgment. The charterparty in this case is silent as to primage: the owner therefore is not entitled to sue for it; neither can the master sue for primage on the charterparty. Can he, then, sue on the bill of lading? Upon the facts stated, we are to assume that by arrangement between the owner and the master, the latter is precluded from claiming primage; and yet this action is brought by the master to recover that which he has

(1) M. & M. 208; 3 M. & R. 4. (2) R. & M. 175.

expressly stipulated with his owner that he will not claim. I think, notwithstanding the terms of the bill of lading, he is not entitled to maintain it.

LOPES, J., concurred.

Judgment for the defendants.

Solicitors for defendants: *Burton, Yeates, & Hart, for Tyrer, Kenion, & Tyrer, Liverpool.*

JAMES SMITH & CO. *v.* THE WEST DERBY LOCAL BOARD. *June 7.*

Negligence—Construction of Public Works—Highway or Sewer Authorities—Notice of Action under Public Health Act (11 & 12 *Vict. c.* 63), *s.* 139.

The defendants, who were both the highway and the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the defendants' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiffs' horse, in consequence of the surface giving way, fell into the trench, and was injured:—

Held, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the defendants,—either as the sewer or the highway authority, or as both,—were responsible.

The notice of action (under 11 & 12 Vict. c. 63), s. 139, stated that the plaintiffs intended to enter a plaint against the defendants for the injury and damage caused to them through the defendants by matters or things done or omitted by them and their laborers and servants, &c., to wit, that they did, by themselves, their laborers and servants, "negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair, whereby" &c.:—

Held, that this was a sufficient intimation to the defendants that they were to be charged with an act of misfeasance, and not merely with a neglect of duty to repair the road.

APPEAL from the county court of Lancashire holden at Liverpool.

This was an action for damage alleged to have been sustained by the plaintiffs by reason of the defendants having negligently, carelessly, and improperly left a road or highway which they were bound to maintain and repair, in an insufficient and improper state, whereby the plaintiffs' horse sustained injury.

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The accident happened on the 13th of May, 1875, the following notice of action was given on the 11th of October, and the action commenced on the 13th of November in the same year:—

Take notice that we (the plaintiffs) will, on the expiration of one month from this date, enter a plaint against you, the said local board of health of West Derby, in the county court of Lancashire holden at Liverpool, for the injury and damage caused to us by the under-mentioned matters and things done or omitted by you and your laborers, servants, and others acting under your orders and directions, at and upon a certain road or highway called Moss Road, in the parish of West Derby, to wit, for that you the said local board of health did, by yourselves, your laborers, servants, and others, on or about the 13th day of May last, negligently, carelessly, and improperly leave a certain portion of the said road or highway in an insufficient and improper state of repair, whereby a horse belonging to us, while being lawfully driven upon and along the said road or highway, sank into the said road or highway and was thrown therein, and by reason of the said negligent, careless, or improper conduct, was thrown down and severely injured and permanently diminished in value: and further take notice that T. G., of &c., is the name of our attorney in the cause of action aforesaid.

The facts were as follows:—By contract dated the 9th of March, 1874, the defendants engaged a contractor to lay down in the road in question (which it was admitted was a road vested in the defendants) a sewer. The sewer was to be a pipe-sewer; and the depth of the trench at the place where the accident occurred was to be about ten feet. The contractor was to excavate, to lay the sewer, and to fill up the trench,—all this under the directions and to the satisfaction of the defendants' engineer. The work was to be completed in three months, that is to say, before the 9th of June, 1874. The contractor was to be responsible for any damage to persons or property that might arise "from the execution of the works," and was to maintain the works, and also such part of the roadway as had been disturbed, in good order and repair for three months after completion.

The work during its progress, the excavation, the laying of the sewer, the filling up, and the restoration of the road, was carefully and daily inspected by the defendants' engineer or by their surveyor of roads and sewers, and everything was done to their satisfaction. The work was completed in May, 1874, and the traffic was then turned on. Some little subsidence took place here and there from time to time; but this was attended to either by the contractor or (at his expense) by the defendants.

After the lapse of about three months, that is to say, just before

the work was to be taken off the contractor's hands, the metalling of the trench was completed by levelling the road and putting on the macadam. This was done either by the contractor or by the defendants at his expense; and it was done under the inspection of the defendants' surveyor of roads and sewers, and to his satisfaction. The traffic was then turned on again. On the expiration of the three months, or soon after, that is to say, in August or September, 1874, the work (which still continued in a satisfactory state) was transferred to the defendants.

The defendants' surveyor continued to inspect or to pass over the road up to the time of the accident: and it was given in evidence that there was nothing a few hours previously to the accident to indicate that there was any defect whatever at the spot in question, that no intimation was received of anything of the kind, and that, so far as the surveyor was aware, no accident had taken place there or near there either previously to the accident in question or since. There was on that road a considerable amount of traffic. Since the transfer above mentioned the road had been from time to time repaired by the addition of a little granite: but in other respects it had not been disturbed in any way.

On the 13th of May, 1875, the plaintiffs' horse, drawing a spring-cart, was going along the road in question, when its fore feet suddenly sank through a coating or crust of macadam into a cavity, and the horse stumbled forward and was hurt. On examining the cavity it was found to be about twelve or fifteen inches deep. How the subsidence was caused is not known. Neither the engineer nor the surveyor could account for it. The former stated that possibly it might have been caused by the floods which had occurred about the time of the accident, and that such floods would affect more or less any foundation of rock and earth that had once been disturbed; and this even after the lapse of a considerable time. Both the engineer and surveyor were asked whether it could have been caused by any leakage in the sewer; and both (they having made careful examination with the view of ascertaining whether that was the cause) gave decided evidence that it could not, and that the sewer was in perfect condition at the time of the accident, and had been so ever since.

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It was contended for the plaintiff that the defendants were liable either as the highway authority or as the sewer authority, the act complained of amounting to more than a mere non-feasance. For the defendants it was contended that they could not be liable as the sewer authority, they having been guilty of no negligence, and the act complained of being at most a mere non-feasance; that, if liable at all, it could only be as the highway authority, and the act being, if anything, merely a non-feasance and not a misfeasance, they were not liable in that capacity: *Gibson* v. *Mayor of Preston* (1), and the cases there cited, and *White* v. *Hindley Local Board* (2), were relied upon.

Judgment was given for the plaintiffs, the damages being assessed at 10*l.*, and leave was given to appeal.

The questions for the opinion of the Court (who were to draw inferences of fact) were,—1. Are the defendants liable in this action as the sewer authority?—2. Are they liable as the highway authority?—3. Are they liable on any other ground?

Baylis, Q.C., for the defendants. The mere suffering a highway to get out of repair affords no ground of action: the proper remedy is by indictment: *Gibson* v. *Mayor of Preston* (1); *Parsons* v. *St. Matthew, Bethnal Green.* (3) In *White* v. *Hindley Local Board of Health* (2), where the defendants, as owners of the sewer, were held liable for suffering a grid or grating which formed part of the sewer to be out of repair, the ground of the decision was that the sewer was vested in the local board, and they were charged with the duty of seeing that the appurtenances of the sewer were not dangerous. Secondly, the notice of action does not point to an act of misfeasance. The 11 & 12 Vict. c. 63, s. 139, requires a notice of action "clearly and explicitly stating the cause of action," and provides that, upon the trial of the action, "the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice." The object of the enactment is that the defendants shall have distinct notice of that with which they are charged, in order to enable them to ascertain the nature and extent of their liability, and so may

(1) Law Rep. 5 Q. B. 218. (2) Law Rep. 10 Q. B. 219.
(3) Law Rep. 3 C. P. 56.

tender amends. This notice points only to non-repair, and therefore discloses no cause of action: *Pendlebury* v. *Greenhalgh* (1); *Jones* v. *Nicholls*. (2) The conclusion the judge came to was not warranted by the evidence. [*Gray* v. *Pullen* (3) was also referred to.]

Cave, Q.C., for the plaintiffs. The point as to the sufficiency of the notice of action is disposed of by *Jones* v. *Bird*. (4) Here, the notice sufficiently calls the attention of the defendants to the matter which is charged against them, viz. that they left the road insufficiently repaired after the digging of the trench. [He was then stopped.]

GROVE, J. I am of opinion that the judgment of the county court judge was right. The first question we are asked is, are the defendants liable in this action as the sewer authority? Upon that question the learned judge gave the judgment which I am inclined to give, viz. that they are liable as the sewer authority. In order to construct the sewer, it was essential that a trench should be dug; and it was their duty to see that it was done in a proper manner, and properly filled in when the sewer was laid. I think they are liable also as the highway authority. They are the persons whose duty it is in that capacity by statute to repair the highway and to keep it in repair. At all events, I should say they are liable in the double capacity of sewer and highway authority. With regard to the objection to the notice of action, which was Mr. Baylis's strongest point, I am of opinion that the notice is sufficient. The test I suggested has, it seems, been already applied by more than one learned judge. The notice is not required to be framed with the strict formality of a pleading. Its object is totally different. A pleading is a complaint of some matter which is a breach of the law, to which the party complained against may plead by way of traverse or confession and avoidance, so that there may be an issue properly framed. But the object of the notice of action is to enable the party complained against to see if there is any ground of action, so as to have an opportunity of tendering amends. All that is required is, that it shall be

(1) 1 Q. B. D. 36.
(2) 13 M. & W. 361.
(3) 5 B. & S. 970.
(4) 5 B. & A. 837.

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sufficiently clear and explicit to shew the ground of complaint,—the cause of action. That must not be left in doubt, or so framed as to mislead. In *Jones* v. *Bird* (1), Abbott, C.J., says: "I think the notice ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained." And in *Jones* v. *Nicholls* (2), Pollock, C.B., says substantially the same.

Now, does this notice convey a sufficient intimation as to what is the cause of action? It is said that it is a mere notice of non-repair, in the sense of allowing the road to become foundrous by the ordinary effect of time and wear, as in *Parsons* v. *St. Matthew, Bethnal Green* (3), and does not direct the defendants' attention to a charge of misfeasance. It seems to me that fairly and reasonably read, and with a mind willing to understand what was meant, it does convey the ground of complaint relied on by the plaintiffs, viz. that the defendants by their laborers and servants left the trench in an improper state, thus shewing a sufficient cause of action: *Gray* v. *Pullen*. (4) It was further contended on the part of the defendants that there was no reasonable evidence to warrant the judge in finding the defendants guilty of negligence. We cannot go into the quantum of evidence: but I think there were facts from which negligence might and ought to have been inferred. The trench was so improperly filled in that a subsidence of from twelve to fifteen inches took place,—a thing not likely to occur by fair wear and tear, if the earth had been properly consolidated. Upon the evidence I should have come to the same conclusion that the judge arrived at. The appeal must be dismissed, with costs.

LINDLEY, J. I am of the same opinion. The real ground of appeal in this case is the special demurrer to the notice of action. It certainly is possible to read the notice as pointing to non-repair only: but, reading it with reference to the circumstances, I think it fairly conveys to the minds of the defendants what is the negligence with which they are charged. Our attention has been called

(1) 5 B. & A. 837, 844.
(2) 13 M. & W. 361.
(3) Law Rep. 3 C. P. 56.
(4) 5 B. & S. 970.

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to the language of 11 & 12 Vict. c. 63, s. 139, which requires that the notice shall "clearly and explicitly" state the cause of action. Now, the notice is that the plaintiffs intend to enter a plaint against the defendants for the injury and damage caused to them through the defendants, by matters and things done or omitted by them and their laborers and servants; and it goes on to explain that by saying "negligently, carelessly, and improperly leaving a certain portion of the road or highway in an insufficient and improper state of repair." It appears to me that that is fairly capable of being read so as to extend beyond a mere suffering the road to become out of repair. It is impossible to say that the defendants were not given a proper opportunity of preparing their defence or tendering amends.

Appeal dismissed.

Solicitors for plaintiffs: *Stocken & Jupp, for Radcliffe & Layton Liverpool.*

Solicitors for defendants: *Hedges & Brandreth, for Thomas Goffey, Liverpool.*

THE LONDON AND BRIGHTON RAILWAY COMPANY *v.* WATSON.

July 3.

Railway Company—Bye-law, Reasonableness of—Passenger travelling without a Ticket—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 103, 109.

A bye-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket" to any duly-authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey:"—

Held, that, as against a passenger who had, in good faith, travelled a short distance upon the line without having procured a ticket, this bye-law was unreasonable and void,—inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 Vict. c. 20, can be punished only if done fraudulently.

APPEAL from the county court of Surrey holden at Southwark.

1. Action by the plaintiff company against the defendant for the balance of a railway fare from New Croydon to Lower Norwood, two stations on the railway of the plaintiff company.

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2. On the 5th of April, 1877, the defendant arrived at the Lower Norwood station by a train which had originally started from New Croydon station. On being asked by the ticket-collector of the plaintiff company for his ticket, he stated, as the fact was, that he had joined the train at Norwood Junction (which is a station of the plaintiff company intermediate between the New Croydon and Lower Norwood stations), and had not had time to get a ticket, as he should otherwise have done, and that he had travelled second-class. The second-class fare from New Croydon station to the Lower Norwood station, viz. 8*d.*, was demanded. This the defendant refused to pay, but offered to pay the second-class fare from the Norwood Junction station to the Lower Norwood station, which was refused by the ticket-collector. The second-class fare from the Norwood Junction station to the Lower Norwood station was at that time 7*d.*

3. When written to by the accountant of the plaintiff company, the defendant sent 5*d.* in stamps as and being 6*d.*, the second-class fare (as he supposed) between the Norwood Junction station and Lower Norwood station, less 1*d.* for the postage of his letter. The defendant, on being informed that the second-class fare between the Norwood Junction station and the Lower Norwood station was 7*d.*, paid to the plaintiff company another 1*d.*, making in all 6*d.* The balance sued for was the difference between the sum of 6*d.* so paid by the defendant to the plaintiff company, and the sum of 8*d.*, the second-class fare between the New Croydon station and the Lower Norwood station.

4. Passengers on the railway of the plaintiff company travelling from the New Croydon station to the Lower Norwood station were not at the time above referred to (except on special examination of tickets) asked to shew their tickets to the officials of the plaintiff company between the said stations, and trains did not stop between the New Croydon station and the Norwood Junction station, there being no intermediate station between those two stations.

5. The plaintiff company had at the same time duly made and published, under the various statutes relating to their railway, bye-laws for the regulation of the said railway, of which the following is one,—

"Bye-law No. 1. No passenger will be allowed to enter any

carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly-authorized servant of the company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The deputy judge gave judgment for the plaintiff company for 1*d.*

The question for the opinion of the Court was whether judgment should not have been given for the plaintiff company for the full amount claimed by them, under the above circumstances.

May 10. *Jeune*, for the plaintiffs. The judgment of the county court judge was wrong. There is nothing unreasonable or repugnant to law in the bye-law in question, which has received the sanction of the Board of Trade.

[LORD COLERIDGE, C.J. Is it not imposing a penalty upon one who it is admitted has been guilty of no fraud? Suppose a man travels by the Great Western Railway from Slough to London simply without a ticket, is not the excess between the fare from Slough and the place from which the train originally started a penalty?]

Having no means of ascertaining where the passenger joined the train, the only way in which the company can protect themselves against fraud is to require him to pay for the whole journey. Is the ticket-collector to take the mere word of a stranger, when he has no means of investigating the truth of his statement? The judgment of Rolfe, B., in *Chilton* v. *Croydon Ry. Co.* (1) puts the reasonableness of this bye-law upon the right ground.

[LORD COLERIDGE, C.J. All that the Court there meant to say was, not that the excess fare was not a penalty, but that it was not a penalty under s. 103 of the Railways Clauses Consolidation

(1) 16 M. & W. 212.

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Act, 1845 (8 Vict. c. 20). The only question was, whether that section justified the arrest of the plaintiff. This is a mere penalty upon a passenger for having lost his ticket. The company is sufficiently protected against fraud by s. 103, which imposes a penalty of 40*s.* upon one who travels on the railway "without having previously paid his fare, *and with intent to avoid payment thereof;*" or the company may protect itself by preventing persons from passing on to the platform who have no tickets.]

There is nothing in this bye-law which is at all repugnant to any of the provisions of the Railways Clauses Consolidation Act, 1845. [The case of *Dearden* v. *Townsend* (1) was also cited.]

May 29. *Macmorran*, for the defendant, contended that this was, in truth, an attempt to impose a penalty upon a person who has been guilty of no offence, but who by mere carelessness or inadvertence may have omitted to obtain a ticket, or who, having obtained one, may have lost or been robbed of it in the course of a journey; and that therefore the bye-law was unreasonable. He referred to *Calder and Hebble Navigation Co.* v. *Pulling* (2), *Brown* v. *Great Eastern Ry. Co.* (3), and *Bentham* v. *Hoyle.* (4)

Jeune, in reply.

Cur. adv. vult.

June 27. LORD COLERIDGE, C.J. In this case the plaintiffs seek to reverse a judgment of the county court judge whereby he had held unreasonable the following bye-law of the plaintiffs:— [His Lordship read it.]

The proceeding in the county court was, as it only could be, an action for the fare authorized by the bye-law; and not a proceeding for a penalty under 8 Vict. c. 20, s. 103. There is no suggestion that the defendant wished to defraud the company. His perfect good faith is admitted. He was simply travelling on the company's line without a ticket; and the action was to enforce payment of a fare in excess of the fare for the distance he had travelled, on the ground that when he arrived at his destination he had no ticket. The sum originally in dispute was but 2*d.*; but the company have thought it worth while to appeal, paying all

(1) Law Rep. 1 Q. B. 10.
(2) 14 M. & W. 76.
(3) 2 Q. B. D. 406.
(4) 3 Q. B. D. 289.

the costs of the appeal whatever may be its result, on the ground of the great importance to them of the question raised by the case. The same reason led my Brother Lopes and myself to take time to consider our opinion; and, having fully considered the matter, I am of opinion that the county court judge was right in holding this bye-law to be void.

I think it void on two grounds,—1. I think in substance it is an attempt to inflict a penalty for doing that without fraud, which, by the joint operation of the 103rd and 109th sections of 8 Vict. c. 20, can be punished only if it is done with fraud. The principle of the decision in *Dearden* v. *Townsend* (1) appears to me to cover this case. It is true that, in that case, the bye-law which was the subject of decision went beyond the bye-law in this, because it proposed to punish the non-payment of the excess-fare by a penalty not exceeding 40*s.*, and the proceeding was a proceeding before justices to enforce that penalty. The actual decision of the Court was, that the company could not by a bye-law make that an offence irrespective of fraud which the Act of Parliament had expressly only made an offence with it; and that so to legislate would be repugnant to the Act, which gave power to the company to legislate only in accordance with and subject to the Act itself. But the judgments seem to me to shew that all the judges of the Queen's Bench were not speaking with reference to the form of the procedure before them only, and that they would have thought this bye-law equally inconsistent with and repugnant to the spirit of the Act of Parliament, inasmuch as under it a perfectly honest person might be visited with highly penal consequences for an act sometimes, as railways are conducted, reasonable or even necessary,—at all events an act perfectly innocent, or at worst no more than careless. Moreover, if I rightly understand the reasoning of the Lord Chief Justice in that case, he thought the bye-law, even apart from the penalty, could only be held good if it was directed to the case of a wilful withholding of a ticket; and in this view my Brothers Mellor and Lush appear to have concurred. I think therefore this case is within the decision in the case of *Dearden* v. *Townsend* (1), with which case I entirely agree.

(1) Law Rep. 1 Q. B. 10.

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We were pressed with the expressions used by the judges in the case of *Chilton* v. *London and Croydon Ry. Co.* (1) The case itself is not in point; not only because the question decided was the legality of an arrest to which the company had subjected the plaintiff in the endeavour to enforce payment from him of the extra fare; but because the Acts of Parliament under discussion in that case were all passed long before 8 Vict. c. 20. But there are, no doubt, expressions attributed to Lords Wensleydale and Cranworth and Baron Alderson which appear to imply, not only that to inflict the whole of the fare upon a man who had travelled but a hundredth part of the whole distance would not be a penalty, but that it would or might be reasonable. If those very learned persons meant no more than that it was not a penalty in the technical sense of the word as used in the Act before them, and could not be recovered by the proceedings before magistrates authorized by that Act, no doubt all they said was perfectly correct. If they meant to say that it was not a highly penal law to inflict a payment of perhaps 5*l.* upon a man who in perfect good faith had travelled no farther than would justify a payment of 5*s.*, with all deference I cannot agree. I am glad to find that in this view I am confirmed by the opinions of the judges of the Queen's Bench in *Brown* v. *Great Eastern Ry. Co.* (2) I shall explain immediately why, if they said, as they hardly did, that such a law *was* reasonable, I venture also respectfully but entirely to differ.

But there is another ground, before we proceed to the question of reasonableness, on which, as I think, this bye-law must be held to be void and illegal. I am not informed in this case, and even if I might import private knowledge into my judgment I do not possess it, what is the largest possible fare which this bye-law would authorize to be exacted. But it is manifest that it might exact from a passenger a sum larger than the largest first-class fare which the Act of Parliament authorizes the company to charge, for the whole distance bonâ fide traversed by the passenger from whom they seek to exact the excess. If, for instance, the passenger has travelled six miles, and the largest fare authorized by the Act of Parliament is 3*d.* a mile, or 1*s.* 6*d.*, and the whole fare exacted from him is 10*s.*, or 15*s.*, or 20*s.*, it is to my mind

(1) 16 M. & W. 212. (2) 2 Q. B. D. 406.

plain that the bye-law is repugnant to the Act of Parliament and bad within the 109th section already referred to. I assume, for the purpose of this holding only, that the fare is not a penalty, and that the passenger has no intention to defraud.

Secondly. The bye-law appears to me to be bad equally upon the ground that it is unreasonable. It is manifestly unequal in its operation. A man who has travelled five miles or fifty may be mulcted in the same sum, without any reference either to the benefit he has derived from the company, or the injury he has inflicted on it. It is unjust; because it makes no distinction between a man who has really perpetrated, or attempted to perpetrate, a fraud upon the company, and one who has by mere inadvertence lost his ticket after having paid his full fare; or from whom it has been stolen; or who has carelessly but innocently neglected to provide himself with one. The penalty, so to call it, which may in some cases and to some persons be a very serious one, is inflicted without any regard to evidence or merits. Once paid, there is as far as I see no obligation on the company under the bye-law to pay it back, even on the clearest proof that the ticket had been only temporarily mislaid, or had been bought and paid for and bonâ fide lost in any one of the numberless ways in which such an accident may happen to even the most careful railway traveller. Moreover, it imposes the fine altogether irrespective of any correlative duty in the company. No information is afforded by the case, and I possess none if I could use it, as to the facilities afforded by this company for the purchase of tickets. But judges cannot strip themselves of their ordinary knowledge. It is at least possible (numerous examples shew that it is highly probable) that tickets are sold by it with an almost contemptuous disregard of the commonest convenience of the public. A single small hole, open often only just as the train is starting, round which hole a struggling and eager crowd congregate, so numerous and so hurried that decent comfort and inquiry are out of the question,—is the common facility, if facility it must be called, to which railway companies intrusted by parliament with a carrying monopoly subject the long-suffering people of this country. No reason of common sense has ever been suggested, except that it might give the companies or their servants a little more trouble, why railway

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tickets should not be sold all day long at the stations, or elsewhere than at the stations, like other tickets with which all of us are familiar. Yet a company which exposes an old man, or a weak man, or a woman, to the alternative of a sharp physical struggle to get a ticket, or the possible loss of the train, takes upon itself to mulct the same passenger in perhaps a highly penal sum, because he travels without that ticket which they have themselves denied him the common and decent facilities to procure. Whether this is so or not with the plaintiff company I do not know. There is certainly nothing to prevent such a working of their traffic, for it is unhappily too common in point of fact; and I think for these reasons this bye-law is unreasonable and bad, as a bye-law very much the same as this, though with the addition or alternative of a penalty, was held to be in a recent case before the Queen's Bench Division: *Bentham* v. *Hoyle*. (1)

I am not at all insensible to the considerations which were very ably pressed upon us by Mr. Jeune, as to the liability of the company to gross frauds at the hands of passengers, and the reasonable necessity for protecting them, as far as may be, from those frauds. That companies are often and seriously defrauded, I do not at all doubt; and I am sure that Parliament would not refuse to give them well-considered and fair powers of prevention or redress. Baron Alderson, in an interlocutory observation made in the case above cited (2), so far back as the year 1847, suggested one check on fraud, which, if companies had a sufficiency of carriages and a sufficiency of servants, would seem to be effective enough. Lapse of time may have shewn very likely that other means should be added to those which he suggested. But, at any rate, the interest of companies is not the only interest to be considered; and companies must not protect themselves by bye-laws unfair and unreasonable against the consequences of their own inadequate, careless, and inconvenient system of working.

It has, indeed, been suggested that, as the 108th section of 8 Vict. c. 20 gives the company the power "to make regulations" for, inter alia, "generally regulating the travelling upon or using

(1) 3 Q. B. D. 289.

(2) *Chilton* v. *London and Croydon Ry. Co.*, 16 M. & W., at p. 230.

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and working of the railway," this bye-law is within these words, and that therefore the company had authority to make it. But, first, the power given in the 108th section is limited by the words of the 109th. And bye-laws made to enforce such regulations must not be repugnant to the general law, nor to the Act itself. For the reasons already given, I think this bye-law is repugnant to the Act. And, next, I should be prepared, if necessary, to hold that the words of the 108th section do not apply to such a regulation as this; and that the words "regulating the travelling upon or using and working the railway" do not extend to such a bye-law as this, but, fairly construed, must be limited to the ordering of the traffic itself and the physical use and working of the lines and stations of the company. It is not, however, necessary to decide this question; as upon other grounds I have arrived at the conclusion that the decision appealed from was correct, and that this appeal must be dismissed, and with costs.

LOPES, J. Having had an opportunity of reading the judgment which my Lord has just pronounced, it is enough for me to say that I entirely concur in it.

Judgment accordingly.

Solicitors for plaintiffs: *Norton, Rose, Norton, & Brewer.*
Solicitor for defendant: *H. S. Smith.*

[IN THE COURT OF APPEAL.]

June 21.

YETTS AND ANOTHER *v.* FOSTER.

Practice—Court of Appeal—Jurisdiction—Appeal against Judgment entered upon Erroneous Finding of Jury—New Trial—Rules of Supreme Court, Order XXXIX., Rule 1*a*, *Order XL., Rule* 4.

When the judge at a trial with a jury directs a finding to be given upon facts which are not really in dispute, and thereupon gives judgment for the party in whose favour the finding is entered, the party, against whom judgment is given, if he is dissatisfied with the finding, may apply to a divisional court for a new trial, but cannot in the first instance appeal from the judgment to the Court of Appeal.

APPEAL of the defendant from judgment after the trial before Brett, L.J.

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The action came on for trial before Brett, L.J., and a jury, at Chelmsford assizes. Some documentary evidence was given and one witness was called; but the facts were not really in dispute, and the question between the parties was substantially one of law. The learned judge told the jury that he thought upon the facts before them they ought to find for the plaintiffs, and the finding was accordingly given and entered for the plaintiffs. The judge said that he should leave the plaintiffs to move for judgment. On a subsequent day at Hertford assizes he stated that he considered that under the Rules of the Supreme Court, December, 1876, he was bound to give judgment, and accordingly he directed judgment to be entered for the plaintiffs.

The defendant appealed.

June 21. *Murphy, Q.C.*, and *Winch*, for the defendant, stated that their contention would be that upon the facts the finding of the jury was wrongly given in favour of the plaintiffs; they argued that this Court had jurisdiction to hear the appeal under Order XL., Rule 4.

Kemp, Q.C., and *J. J. Sims*, for the plaintiffs.

PER CURIAM (Bramwell, Baggallay, and Thesiger, L.JJ.) This appeal is really upon the ground of misdirection, and under the Rules of the Supreme Court, Order XXXIX., Rule 1a, the defendant ought to have moved for a new trial in the Common Pleas Division, and the Court of Appeal has no jurisdiction to hear the appeal. A judge sitting at the trial of an action is not bound to direct judgment to be entered upon the findings of the jury, but may leave either party to move for judgment. (1) The appeal must be dismissed for want of jurisdiction to hear an application for a new trial, and the judgment upon the finding as entered is correct.

Appeal dismissed. (2)

Solicitors for plaintiffs: *Hensman & Nicholson.*

Solicitors for defendant: *Vallance & Vallance*, for *Blood & Son, Witham.*

(1) See Order XXXVI., Rule 22 a. (2) See *Etty* v. *Wilson*, 3 Ex. D. 359.

COXHEAD *v.* MULLIS.

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July 3.

*Infancy—Promise of Marriage—Ratification—*37 & 38 *Vict. c.* 62 (*The Infants Relief Act,* 1874), *s.* 2—*Fresh Promise—Evidence of.*

The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, providing that "no action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." applies to promise of marriage.

The defendant, during his infancy, promised to marry the plaintiff, and, after coming of age, recognised without expressly repeating the promise, and eventually broke it.

The plaintiff sued him for the breach, and was nonsuited:—

Held, that the nonsuit was right; for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age.

ACTION in the Lord Mayor's Court, for breach of an agreement to marry.

Pleas: 1. Denial of the agreement. 2. Infancy. 3. Release and exoneration.

Replication: 1. Issue. 2. That the defendant after he attained his majority ratified and confirmed the agreement. 3. Denial of the release.

At the trial, before the Recorder of London, the plaintiff proved courtship by the defendant, and, on the 14th of October, 1876, a formal offer of marriage from him, and an engagement between them. The defendant was then a minor. He came of full age on the 8th of March, 1877, and afterwards they continued on the same terms, but nothing definitely was said about marriage. She received affectionate letters from him. They visited each other, and walked out together frequently; differed and were reconciled. Finally, he became cold towards her, she complained, and on the 24th of September he broke off the engagement. The mother of the plaintiff corroborated her testimony, and some of the letters were put in evidence.

For the defence it was contended that the promise made during the infancy of the defendant was invalid, and could not be ratified after his majority, by reason of 37 & 38 Vict. c. 62, s. 2. Nonsuit, with leave to move.

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A rule nisi having been obtained to set aside the nonsuit, and for a new trial on the grounds, first, that the contract was not a contract within 38 & 39 Vict. c. 62; secondly, that there was evidence to go to the jury of a contract on which defendant was liable.

June 26. *Sutton* shewed cause. First, there was undoubtedly a promise of marriage made by the defendant during his infancy; but it did not bind him. He could not ratify it. "No action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." 37 & 38 Vict. c. 62, s. 2. That section applies to all contracts made by an infant, and a ratification after majority is rendered as void as a contract made during infancy: see *Ex parte Kibble, In re Onslow.* (1) Secondly, the only promise made was that of the infant, and his amatory conduct after coming of age is merely evidence of a ratification of the promise made during infancy, and not evidence of any fresh promise.

A. Cock, in support of the rule. First, s. 1 defines the contracts rendered void by the Act, viz., all contracts for the repayment of money, or for goods (other than necessaries), and all accounts stated by an infant. And s. 2, although its terms are wide, was intended to invalidate the ratification of such contracts only. Secondly, there was evidence of a new implied contract made after the defendant attained his majority: *Cawthorne* v. *Cordrey.* (2) That case arose under the 4th section of the Statute of Frauds, which provides that "no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof." On Sunday, the 23rd of March, the plaintiff made a contract to serve the defendant from the 24th for a year, and entered upon the service on the 24th. The Court of Common Pleas held that there was evidence of a fresh agreement on the 24th.

[LORD COLERIDGE, C.J. You say then that evidence of an agreement void in law may be evidence of another which is binding? But must not the evidence afforded by conduct of the defendant after he came of age be referred only to the definite promise made previously?]

(1) Law Rep. 10 Ch. 373. (2) 13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152.

It was some evidence of a renewed promise; whether it was sufficient to prove such promise was a question for the jury. Therefore the nonsuit should be set aside.

Cur. adv. vult.

July 3. LORD COLERIDGE, C.J. This case raises an interesting question, whether the 37 & 38 Vict. c. 62, which is the Infants Relief Act, does or does not apply to the case of a breach of promise of marriage. The action is brought against a person of full age for the breach of a contract of marriage, which he undoubtedly had made when an infant. There had been various disputes between the parties, and finally the engagement was broken off after the defendant had become of full age. It was admitted that there had been no fresh contract or promise after the defendant came of age; or, at all events, there was no evidence of any such fresh promise. There had been a clear promise before, and there was abundant evidence of ratification, if ratification alone would do, after the defendant attained his majority. Before saying a word upon the question whether the Act applies, I may observe that I am of opinion that, where there is a clear promise, such as was proved in this case—a promise to marry being in this respect like any other contract—ratification, if it exists, must have reference to the contract proved; and you cannot say, because there is a ratification from day to day, that there is a fresh promise from day to day. Evidence of ratification is one thing, evidence of a fresh promise is another; and, if there is positive proof that the promise was made before and the ratification after the defendant became of full age, supposing that the Act applies to such a case, I am of opinion that the ratification would not be evidence of a fresh promise, but must be referred to the promise made before the defendant was of age.

It is admitted in this case that, if the Act does not apply, there is abundant evidence to fix the defendant, supposing he had been sued under the old law; therefore the question simply arises upon the recent statute. Now, the Act consists of two sections only. The 1st enacts that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the re-payment of money lent or to be lent, or for goods supplied or to be

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supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void." Then the 2nd section enacts that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." The question is whether that does or does not apply to a case of breach of promise of marriage. The words of the 2nd section, I think, are quite sufficient to include such a promise. The argument was, that, as regards the 1st section, it is entirely confined to contracts entered into for the re-payment of money and goods supplied or to be supplied; and that the first part of the 2nd section confines itself entirely to promises made after full age to pay a debt contracted during infancy; and it is suggested that we ought to read the second part of the 2nd section as if it ran thus: "or upon any ratification made after full age of any *such* promise or contract made during infancy."

I believe this is the first time this section has had to be considered with reference to this matter. I should have gladly deferred to any judicial authority which could have been presented as throwing light upon the subject; but, in the absence of any such authority, the tendency of my own mind, right or wrong, always is, to suppose that parliament meant what parliament has clearly said, and not to limit plain words in an Act of Parliament by considerations of policy, if it be policy, as to which minds may differ, and as to which decisions may vary. We may thus make that which is a plain and simple enactment,—I will not say inoperative, but—doubtful or obscure, if considerations are to be introduced into the construction of it, when it is entirely uncertain whether they were present to the minds of the legislature when the enactment was made. Looking at this section, I find the words change their form, and I cannot accede to the argument of the plaintiff's counsel, without putting a word into the statute, viz., "such," which parliament has deliberately left out, and which I am not to assume that parliament has carelessly left out, meaning that the judge should supply it. Therefore, upon the best consideration I can give to the matter, I think this Act of Par-

liament does apply to breaches of promise of marriage. It certainly is a matter which in my judgment comes within the fair contemplation of the law with regard to infants. I see nothing to limit the words of the Act, and I hold, therefore, that the defendant is entitled to succeed.

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My Brother Lopes had at first some doubts on the matter; but, before he left London for circuit, he authorized me to say that those doubts were removed. The judgment I have pronounced must therefore be taken to have the sanction and approval of my Brother Lopes.

Judgment for the defendant.

Solicitor for plaintiff: *R. Chapman.*
Solicitors for defendant: *Clarkson, Son, & Greenwell.*

[IN THE COURT OF APPEAL.]

Feb. 14.

CUNNINGHAM *v.* DUNN AND ANOTHER.

Ship and Shipping—Charterparty—Foreign Government Refusing to Allow Ship to Load—Vis Major—"Dead Weight."

By a charterparty it was agreed that the defendants' ship, the *R.*, should, after loading "dead weight" at M., proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the *R.* at M. would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Government to relax the prohibition, permission to load was refused. The *R.* arrived at V. with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:—

Held, that the plaintiff could not sue the defendants for not having the *R.* ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo, and the defendants to receive it.

Ford v. *Cotesworth* (Law Rep. 4 Q. B. 127; in Ex. Ch. 5 Q. B. 544) followed.

ACTION by charterer against shipowners.

By a charterparty dated the 8th of October, 1875, it was agreed between the defendants, Dunn & Raeburn, owners of the ship *Rainton* "now on her way to Genoa and Malta," and the plaintiff, that the ship should, "with all convenient speed after

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loading dead weight at Malta for owners' benefit, sail and proceed to Messina, and one first-class Spanish port in the Mediterranean, or two first-class Spanish ports in merchant's option, or one Spanish port only (orders to be given at Malta twenty-four hours after steamer's arrival there, or so near thereto as she may safely get), and there load from the factors of the said affreighter, the remaining measurement space of light cargo only, including all descriptions of fruit; cargo not to exceed 400 tons, nor to be less than 301 tons, which the said affreighter binds himself to ship." The port of destination was "River Thames, London," and the charterparty contained the clause, "the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted." The charterparty contained also provisions of the usual kind as to payment of freight, and as to the lay days, and as to lien for freight. In the margin of the charterparty the following memorandum was written: "By 'first-class' is meant any port that a steamer with cargo from a foreign port can load at by Spanish law, without risk of detention by custom-house authorities."

At the trial, which took place before Lord Coleridge, C.J., and a special jury, it appeared that the *Rainton*, upon her arrival at Malta, took on board military stores belonging to the British Government, as dead weight, pursuant to a contract previously entered into by the defendants; she afterwards sailed for Valencia to load, pursuant to the charterparty. On hearing that the *Rainton* had munitions of war on board, the plaintiff's agent at Valencia informed him that by the law of Spain the *Rainton* would not be allowed to load, and would be liable to confiscation. Thereupon an effort was made through the British Minister at Madrid, to induce the Spanish Government to permit the *Rainton* to load. This permission, however, could not be obtained, and the *Rainton* sailed for Gibraltar without loading, immediately after her arrival at Valencia. This was the breach of the charterparty complained of by the plaintiff. The cargo, which had been intended for her, was shipped by other vessels, and the plaintiff alleged that he had sustained damage by the breach to the extent of 351*l.* 9*s.* 8*d.*

In answer to questions left to them by the learned judge, the

jury found that when the charterparty was entered into, the plaintiff did know that the dead weight to be taken by the *Rainton* at Malta was military stores; and further, that he did know, when he ordered the ship to Valencia, that this circumstance would subject her to embargo, and would prevent the loading of other cargo; that the defendants became aware of the Spanish law, after the *Rainton* had gone to Malta.

Upon these findings, Lord Coleridge, C.J., gave judgment for the defendants.

The plaintiff appealed.

Feb. 13, 14. *Murphy, Q.C.*, and *R. M. Bray*, for the plaintiff. Notwithstanding the findings of the jury, the judgment ought to be entered for the plaintiff. The question depends upon the construction of the charterparty, and particularly upon the meaning of the clause, "after loading dead weight at Malta for owners' benefit;" it is submitted that "dead weight" does not include military stores. In every charterparty an implied warranty is contained that the vessel shall be fit and ready at the port of loading to take on board the agreed cargo: *Stanton* v. *Richardson* (1); and by taking on board munitions of war, this implied warranty was broken. By their own acts the defendants disabled themselves from fulfilling their contract. The charterparty must be interpreted according to the language used therein, and the surrounding circumstances must not be considered. The defendants' counsel may rely upon *Ford* v. *Cotesworth* (2), but in that case the owner of the ship sued the charterer for delay in unloading her; here the plaintiff was altogether debarred from loading the agreed cargo. *Harris* v. *Dreesman* (3), so far as it is not an authority for the plaintiff, may be distinguished in like manner. By the charterparty, the defendants undertook to have their vessel ready to load at Valencia; and the case falls within the principle laid down in *Paradine* v. *Jane* (4), namely, that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided

(1) Law Rep. 9 C. P. 390.
(2) Law Rep. 4 Q. B. 127; in Ex. Ch. 5 Q. B. 544.
(3) 23 L. J. (Ex.) 210.
(4) Aleyn, 26, at p. 27.

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against it by his contract;" and this principle was adopted and applied by the Court of Common Pleas in *Medeiros* v. *Hill* (1), where it was held that it was no defence to an action on a charterparty for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charterparty. The defendants were not prevented from performing their contract by any inevitable accident: the present case is unaffected by the decision in *Appleby* v. *Myers* (2). The defendants as shipowners are liable for any act, which they were not allowed by the charterparty to commit, and which prevented them from fulfilling their contract. Moreover, even if the defendants could lawfully ship at Malta warlike stores, it became their duty to obtain the permission of the Spanish Government to load at Valencia (3).

Cohen, Q.C., for the defendants. In the events which happened, neither party can sue the other for breach of contract. No warranty could be implied that the dead weight put on board the *Rainton* should allow her to load at Valencia. *Ford* v. *Cotesworth* (4) is in point, and is decisive for the defendants. Neither party was ready to perform the contract at Valencia, because both were prevented from being ready.

Murphy, Q.C., replied.

BRAMWELL, L.J. I think that this judgment must be affirmed. I do not see any ground for blaming the conduct of the plaintiff in commencing these proceedings; upon the other hand it is a little hard upon the defendants that they should be sued in the present action, for the plaintiff was aware that he was running a risk, and that the Spanish Government might prevent the cargo from being put on board. I think that the defendants committed no default at Valencia. I think that this case is governed by the principle laid down in *Ford* v. *Cotesworth* (4); the plaintiff as charterer was willing to put a cargo on board, but a power over which neither

(1) 8 Bing. 231.

(2) Law Rep. 2 C. P. 651.

(3) In the course of his argument Murphy, Q.C., stated that he was prepared to contend that Valencia was a "first-class port" within the meaning of the memorandum written in the margin of the policy, but Cohen, Q.C., said that he should not for the defendants rely upon the words of that memorandum.

(4) Law Rep. 4 Q. B. 127; in Ex. Ch. 5 Q. B. 544.

party had any control prevented the defendants, as shipowners, from receiving it. However, the counsel for the plaintiff contended, that the charterparty contained an implied warranty that the ship should be presented to the plaintiff in such plight and condition that she might lawfully take on board the proffered cargo. I know of no authority supporting such a proposition. We have to construe the words, "now on her way to Genoa and Malta," and also "with all convenient speed after loading dead weight at Malta, for owners' benefit, sail and proceed to Messina, and one first-class Spanish port in the Mediterranean, or two first class Spanish ports in merchant's option, or one Spanish port only." The object of these words was probably to shew, that the ship was not to go to Valencia direct, but they also shew that she was proceeding to Malta for dead weight, and there is no restriction as to what the dead weight is to be. The fair construction is that she might take on board any kind of dead weight, and that there was no general warranty that it should be such as the Spanish Government should deem lawful. It has been further contended, that even if there was no warranty, at all events a shipowner ought not to disable himself from performing his part of the contract. I think that great weight may be attached to that argument; nevertheless, as it seems to me, it ought not to prevail, for the defendants or their agents do not seem to have known that there was a real impediment; they appear to have believed that the prohibition would not be peristed in. It has been argued that they ought not to have risked a refusal of the permission to load; as to this I am not clear, for the charterparty does not in express terms forbid the taking on board of military stores; but, at all events, the defendants may say that if the plaintiff might have lawfully objected to the loading of government stores, he gave them a licence to do so; that licence was a continuing licence. The plaintiff knew what the defendant's ship had on board, and yet allowed her to sail, in fact sent her, to Valencia. My judgment is for the defendants, and the grounds of it are, first, that there was at Valencia a joint inability to perform the charterparty, and not a refusal by the defendants so to do; secondly, that there was no warranty that the dead weight should be such as to allow the vessel to be loaded; thirdly, that if the defendants were bound not

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to disable themselves from taking on board the plaintiff's cargo, they did not know at the time of entering into the charterparty that they would so disable themselves; and, fourthly, that the plaintiff gave the defendants licence to sail to Valencia with the military stores on board.

BRETT, L J. Under a charterparty in the ordinary form, the shipowner is bound to have his ship in proper condition for loading at the port within the time specified; and if he is prevented by any unforeseen cause from fulfilling his engagement, he is liable to pay damages for the breach of his contract. The charterer is bound to have the cargo ready to be put on board within a stipulated time, and if any unforeseen casualty arises whereby he becomes unable to load according to his undertaking, that misfortune is his misfortune and he is liable to compensate the shipowner. In this case primâ facie the defendants, as shipowners, were bound to have the *Rainton* ready to be loaded at Valencia, and the plaintiff, as charterer, was bound to have the cargo ready to be put on board at that port. But the question arises, how far the ordinary rule is varied by the special circumstances of this case. At the time of entering into the charterparty the ship was on her way to Genoa and Malta, and by its terms she was to proceed to Messina and a Spanish port, or Spanish ports only, as the plaintiff might direct. A somewhat unusual stipulation is inserted as to loading dead weight at Malta for the owners' benefit. In my view, we are at liberty to refer to the evidence of the existing facts for the purpose of shewing what were the circumstances as to which the parties were negotiating. It was intended that the *Rainton* should load at Malta military stores, and the evidence shews, and the jury have found, that the plaintiff was aware of this intention. The plaintiff and the defendants were negotiating with reference to this state of facts, and it was known to the plaintiff that "dead weight" did include military stores; and as it seems to me, the reference to the voyage to Genoa and Malta was introduced for the purpose of calling attention to the fact, that she was to load the dead weight before she proceeded upon the chartered voyage. We may receive this evidence as to the force of the words "dead weight;" it does not contradict the charter-

party, but it explains it; and it is therefore admissible upon the principle acted upon in *Macdonald* v. *Longbottom*. (1) In my opinion, the result of the evidence is that it was agreed that the defendants might take on board at Malta military stores as dead weight, and that after loading them the ship should proceed to Valencia. When she reached that port, in all respects but one, she was ready to load such a cargo as was mentioned in the charterparty: the defendants had done nothing inconsistent with their contract, and had done only what they were entitled to do. But by reason of Spanish law, and of the refusal of the Spanish Government to mitigate it, the defendants were not ready to load, but also the plaintiff was not ready to put the cargo on board: the law of Spain prevented the parties from performing what they had respectively undertaken to do. *Ford* v. *Cotesworth* (2) is in point, and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. For these reasons I think that the judgment of Lord Coleridge ought to be affirmed.

COTTON, L.J. When the defendants' ship reached Valencia, so far as the purposes of navigation were concerned, she was ready to receive the agreed cargo, but she was prevented from loading it because she had on board military stores. We may assume that the plaintiff had provided a cargo; but both parties were prevented from performing their respective undertakings by the prohibition of the Spanish Government. Under these circumstances, we must look at the contract entered into between them. Of course, parol evidence must not be allowed to give to the written words a meaning which otherwise they would not bear; but we may and must learn what the facts were for the purpose of construing it aright. Both parties knew that the vessel was upon her way to Malta: the plaintiff knew that the permission to load might be refused after taking on board military stores. All that the shipowners have done has been done in accordance with the terms of the contract. The charterer cannot say that the ship has not been loaded through the default of her owners: the

(1) 1 E. & E. 977; 28 L. J. (Q.B.) 293; in Ex. Ch. 1 E. & E. 987; 29 L. J. (Q.B.) 256.

(2) Law Rep. 4 Q. B. 127; 5 Q. B. 544.

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act of the Spanish Government has prevented the contract between the parties from being carried out.

Judgment affirmed.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendants: *Miller & Smith.*

May 1, 8.

[IN THE COURT OF APPEAL.]

PERCY ATTENBOROUGH *v.* THE LONDON AND ST. KATHARINE'S DOCK COMPANY.
ROBERT ATTENBOROUGH *v.* THE SAME.

*Interpleader—Indorsee of Dock Warrant—*1 *&* 2 *Wm.* 4, *c.* 58, *s.* 1—*Common Law Procedure Act,* 1860 (23 *&* 24 *Vict. c.* 126), *s.* 12—*Different Liabilities —Damages for Detention—Contract for Sale of Goods induced by Fraud—Property in Goods obtained by Fraud.*

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S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.: the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with the defendants, a dock company, who issued warrants for the same: some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiffs to secure advances. L. afterwards served notice upon the defendants not to part with the wine: thereupon the defendants refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:—

Held, reversing the decision of the High Court of Justice, that the defendants were entitled to an interpleader order under 1 & 2 Wm. 4, c. 58, s. 1, and the Common Law Procedure Act, 1860, s. 12, for the right to the wine might be determined as between the plaintiffs and L., and the actions might be stayed as to that, and might be continued as to the claims for damages, and by issuing the dock-warrants the defendants had not debarred themselves from obtaining relief under those statutes.

Crawshay v. *Thornton* (2 My. & Cr. 1) discussed.

Held, also, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon the plaintiffs, and that L. must be barred upon the plaintiffs undertaking to account to him for the value of the wine after deducting their advances.

APPEAL by the defendants against the decision of the High Court of Justice affirming the dismissal by Field, J., of a

summons under the Interpleader Acts. (1) The following were the facts appearing in this Court at the hearing upon the 1st of May:—

In the action commenced by Percy Attenborough, it appeared that about the 7th of June, 1877, thirteen butts of wine, brought by the *Gibraltar* from Cadiz, were entered by C. J. Dolaro for warehousing at the Custom House, London, and about the same time seven of them were received by the defendants. About the 12th of June the defendants issued seven warrants (one for each butt), making the wine deliverable to C. J. Dolaro, or by indorsement to his assigns: upon the 20th of June, five of these seven warrants were pledged with the plaintiff by one Cohen, as security for an advance of 55*l.* and interest, and on the 27th of August the remaining two of the seven warrants were pledged with the plaintiff to secure an advance of 14*l.*: the warrants had been indorsed by C. J. Dolaro. The plaintiff was to sell the wine to cover his advances if they were not repaid within three months.

In the action commenced by Robert Attenborough, it appeared that in June, 1877, certain other wines were received by the defendants upon being landed from the *Gibraltar* in which they were imported. The defendants in the course of that month issued warrants in respect of these wines: by all the warrants (except one) the wine thereby represented was made deliverable to W. Schultz, or by indorsement to his assigns: by the remaining warrant the wine thereby represented was made deliverable to C. J. Dolaro, or by indorsement to his assigns. In the months of July and September these warrants were pledged with the plaintiff, Robert Attenborough, for advances of money upon the security thereof. The plaintiff was to sell the wine to repay himself the advances if they were not repaid within three months.

At the end of October the defendants received notice in writing from E. D. Lewis, the solicitor for Diego Lopez, of Zerez de la Fontera, that the wine mentioned in all the warrants above referred to had been obtained from his client by fraud, and he requested them not to part with the wine. In the month of February, 1878, the plaintiffs produced the warrants held by them respectively to the defendants, and demanded that the wines

(1) Ante, p. 373.

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should be given up to them; they at the same time tendered the amount of the dock-rent, rates, and charges. The defendants, however, refused to give up the wines, and thereupon the present actions were commenced; the plaintiff, Percy Attenborough, alleged that he had sold the wines represented by the warrants held by him, and that he was liable to pay damages to the purchasers thereof. The defendants claimed no interest in the wines other than the usual dock-rent, rates, and charges, payable in respect of them. The defendants having taken out an interpleader summons, it was dismissed by Field, J., as above-mentioned. Prior to the hearing in this Court upon the 1st of May, no affidavit was produced in support of the claim of Lopez: an affidavit sworn on the morning of that day by E. D. Lewis, his solicitor, was then produced and read to the Court: it alleged that the documents relating to the wine had been obtained from Lopez by fraud; the Court, however, intimated that further evidence of a more definite nature must be procured.

May 1. *Watkin Williams, Q.C.* (*Wood Hill,* with him), for the defendants in each action in support of the appeal. In the High Court of Justice, Lord Coleridge, C.J., and Huddleston, B., held that the defendants were not entitled to interplead on two grounds; first, because they had entered into relations with the plaintiffs, to whom the dock-warrants had been transferred; secondly, because the plaintiffs claimed damages against the defendants for the refusal to deliver the wine, and therefore that the claims of the plaintiffs and Lopez respectively were not of the same kind. As to the first ground, Lord Coleridge relied upon *Crawshay* v. *Thornton* (1); but that case has become of no effect since the passing of the Common Law Procedure Act, 1860, s. 12, and is inconsistent with the later decisions in *Best* v. *Hayes* (2), and *Tanner* v. *European Bank.* (3) As to the second ground, if the plaintiffs have any real claim for damages in addition to the value of the wine against the defendants, that may be reserved until after the determination of the issues between the plaintiffs and Lopez.

(1) 2 My. & Cr. 1. (2) 1 H. & C. 718; 32 L. J. (Ex.) 129.
(3) Law Rep. 1 Ex. 261.

Marriott, Q.C., and *W. Attenborough*, for the plaintiffs. The plaintiffs are entitled to substantial damages for the detention of the wine in addition to the amount representing its value: *France* v. *Gaudet* (1), cited in Mayne on Damages, p. 16 (3rd ed.).

[BRETT, L.J. The damages claimed for the detention of the wine are too remote, for the defendants had no notice of the alleged sub-contracts at the time when they undertook to keep it: to allow them would be to decide in opposition to a long series of cases.]

At all events, the plaintiffs ought not to be damnified by a change of opponents; the defendants are a solvent company, carrying on business in England, whereas Lopez is a foreigner residing abroad, and may be unable to pay the costs of the issues if he is defeated. The plaintiffs ought not to be compelled to contest in one suit the right to the wines, and in another their claims for damages.

The facts in the present case strongly resemble those in *Crawshay* v. *Thornton*. (2) The defendants, by issuing the dock-warrants, have estopped themselves from denying the plaintiffs' title as assignees thereof. The plaintiffs and the defendants are both innocent parties; but the defendants had a better opportunity of inquiring into the title to the wine, and therefore they, and not the plaintiffs, ought to suffer by the fraud. The warrants were issued under London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), ss. 106, 107, 108, and the defendants cannot now refuse to recognise a title which arises upon a document issued by themselves.

Then upon the merits Lopez ought to be barred, for until this morning no affidavit has been made upon his behalf, and that affidavit shews that though a fraud was practised upon his agent Speller, nevertheless the property in the wine has passed from him.

The present case is not within the Interpleader Acts: *Slaney* v. *Sidney* (3); *Baker* v. *Bank of Australasia*. (4) The proper remedy for the defendants was to make Lopez a third party to the actions under Rules of the Supreme Court, Order XVI., Rules 17–21.

(1) Law Rep. 6 Q. B. 199.
(2) 2 My. & Cr. 1.
(3) 14 M. & W. 800.
(4) 1 C. B. (N.S.) 515.

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[BRETT, L.J. If that argument were correct, interpleader proceedings on behalf of private persons would be superseded.]

Sullivan, for the claimant Lopez, asked for leave to file a further affidavit.

BRAMWELL, L.J. It has been held by Field, J., and in the High Court of Justice, that these cases do not fall within the Interpleader Act (1 & 2 Wm. 4, c. 58), as amended and altered by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). I feel myself unable to agree with that decision. From my knowledge of the practice at Judge's Chambers, I can say that many cases resembling those before us have been dealt with under the jurisdiction created by those statutes. The mischief which the legislature intended to remedy was of the following nature: a person in possession of goods might be sued by some one setting up a title to them; if the claim was contested, he might be defeated and be liable to pay the value of the goods; and afterwards he might be sued by some other claimant to the goods, and it would be no defence to say that the value of the goods had been already paid to a prior claimant; the new claimant, if he was the real owner, would be entitled to recover in respect of them, and to say that he was not bound by the proceedings in the former action. Therefore a person who had committed no legal wrong, but was simply in possession of goods claimed by other persons, might be compelled to pay their value twice over. The only remedy for this hardship was the expensive procedure by a bill of interpleader. In order to do away with this inconvenient state of matters, the Interpleader Act (1 & 2 Wm. 4, c. 58) was passed, and I think that the cases before us fall exactly within the words of s. 1. These actions are at least modern substitutes for the former actions of "detinue or trover." The defendants do "not claim any interest in the subject-matter of the suit," for their alleged right of lien is not an "interest" in the wine. (1) I can see no reason for holding that these cases do not fall within the spirit of this most useful statute.

It has been suggested that the defendants ought not to be allowed to interplead, because the claimant Lopez is a foreigner

(1) See *Cotter* v. *Bank of England*, 2 Dowl. 728; 3 M. & Sc. 180.

residing out of the jurisdiction of the High Court. That is no ground for rejecting this application, although it may be a reason for making him give security for costs or barring him altogether.

It has been further suggested that the order for interpleader ought to be refused, because the plaintiffs have claims for damages against the defendants, which they have not as against Lopez. Upon the materials before us, I do not think that the plaintiffs can sustain any claim for damages; but I will assume that they have substantial claims, and whatever orders may be ultimately made in these actions, care will be taken to preserve any claims for damages which the plaintiffs fancy that they can enforce.

It has been contended, that by making the interpleader order in the form asked for the plaintiffs may be exposed to the inconvenience of contesting two suits, one against Lopez with respect to the title to the wine, and the other against the present defendants with respect to the alleged damages. It may be admitted that this is an inconvenience, but it is a less inconvenience than that which the statutes were intended to remove; and the hardship upon the plaintiffs is not to be compared with the hardship upon the defendants, who, if the order were refused, might possibly be called upon to pay the value of the wine twice over. Therefore, upon principle, it seems to me that these cases ought to be dealt with under the Interpleader Acts.

Certain authorities have been cited during the argument before us, but in my opinion, with the exception of one case, they all are against the plaintiffs. The decisions in *Meynell* v. *Angell* (1), in *Best* v. *Hayes* (2), and in *Tanner* v. *European Bank* (3), fully warrant the application for an interpleader order; but I do not find that they are considered in the judgments delivered in the High Court of Justice. The only case at all in favour of the plaintiffs is *Crawshay* v. *Thornton*. (4) That was a case of a bill of interpleader filed under the practice formerly existing in the Court of Chancery, and it is unnecessary to consider whether it was correctly decided; for in the cases before us the summonses were issued under 1 & 2 Wm. 4, c. 58, and, as I have before intimated,

(1) 32 L. J. (Q B.) 14.
(2) 1 H. & C. 718; 32 L. J. (Ex.) 129.
(3) Law Rep. 1 Ex. 261.
(4) 2 My. & Cr. 1.

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the facts appear to fall precisely within the words of that statute. But I wish also to remark that *Crawshay* v. *Thornton* (1) was decided before the passing of the Common Law Procedure Act, 1860, s. 12, and from my own knowledge as one of the common law commissioners I can say that it was intended to do away with the effect of that decision.

It was further contended that the defendants were estopped from denying that the wine is the property of the plaintiffs; but it is clear that in no case is Lopez estopped, and therefore the estoppel cannot operate for the benefit of the defendants. It seems to me a proposition quite incapable of being sustained, that Lopez can recover the value of the wine from the defendants, and that they should at the same time be liable for it to the plaintiffs. Suppose that the defendants, on the trial of these actions, could make out that Lopez is entitled to this wine, that the property in it never passed out of him—in fact, that it was stolen from him, and that Schultz and Dolaro had no title to it; is it conceivable that the defendants would be estopped from setting up this state of matters as an answer to the plaintiffs' claim? I think that there is no estoppel against the defendants in favour of the plaintiffs.

It has been further argued that the application for leave to interplead is unnecessary, for the defendants may proceed to make Lopez a third party to the actions under Rules of the Supreme Court, Order XVI., Rules 17–21. I confess that at one time I thought some weight ought to be attached to this contention; but upon further consideration I am of opinion that it ought not to succeed. The defendants wish to get rid of the litigation altogether, and the Interpleader Acts afford them a ready mode of relieving themselves from the difficulty in which they are placed. Moreover, as Lord Justice Brett has remarked, the argument for the plaintiffs upon this point is too good to be true; for if it were correct, the effect of the rules which I have mentioned would be to abolish altogether proceedings by interpleader at the instance of private persons.

For the reasons which I have assigned, I think that these cases fall within the Interpleader Acts, and that nothing prevents us from giving the defendants the benefit of them. Whatever order

(1) 2 My. & Cr. 1.

we may ultimately make, as this is an appeal from a refusal to entertain the application for leave to interplead, the appeal is successful unless the affidavits hereafter to be produced on behalf of Lopez shew that upon the merits the defendants ought not to have attempted to interplead. Therefore, as at present advised, I think that they ought to have the costs of it. At all events, as the case is to be adjourned for the benefit of Lopez, who was not ready at the proper time with affidavits in support of his claim, he must pay the costs occasioned to both parties by the adjournment.

BAGGALLAY, L.J. I agree with the conclusion at which Lord Justice Bramwell has arrived, and also with the reasons which he has assigned. I wish, however, to make some remarks as to that portion of the argument for the plaintiffs which was based upon *Crawshay* v. *Thornton* (1), especially as it appears to have been approved of by Lord Coleridge, C.J. The counsel for the plaintiffs have relied upon the issue of the dock-warrants by the defendants, and have urged that, when they passed into the hands of the plaintiffs, a relation was established between the latter and the defendants, which would bring the facts within the authority of *Crawshay* v. *Thornton.* (1) Now it is quite true that that case was decided after the year 1831, when the Interpleader Act was passed, and that the judgment of Lord Cottenham, L.C., proceeded upon the principle, that where the person seeking to interplead had entered into any special obligation with either of the parties claiming a right to the goods, he was not entitled to be relieved in equity. The same principle was, to some extent, adopted in the courts of common law, and as to this I may refer to *James* v. *Pritchard* (2), which was mentioned in *Meynell* v. *Angell* (3), decided by the present Lord Blackburn. But these decisions were prior to the passing of the Common Law Procedure Act, 1860, s. 12, and I have strong reason to believe that this clause was enacted in order to prevent the further application of the principle laid down in *Crawshay* v. *Thornton.* (1) Some cases have been referred to, during the argument, which have been decided since that statute; I allude to *Meynell* v. *Angell* (3), to *Best* v. *Hayes* (4), and

(1) 2 My. & Cr. 1.

(2) 7 M. & W. 216; see also *Farr* v. *Ward*, 2 M. & W. 844.

(3) 32 L. J. (Q.B.) 14.

(4) 1 H. & C. 718; 32 L. J. (Ex.) 129.

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to *Tanner* v. *European Bank* (1); and in all of these cases it was held that even although it might possibly be doubtful before the Common Law Procedure Act, 1860, whether the courts of common law ought not to follow the principle laid down by Lord Cottenham, L.C., in *Crawshay* v. *Thornton* (2), yet by the passing of that statute all these doubts have been removed, and the fact of a person in possession of goods having entered into a contract with one of the parties claiming them does not debar him from obtaining an exercise in his favour of the powers conferred by the Interpleader Acts. I may go further and say that, in my opinion, if after the Common Law Procedure Act, 1860, s. 12, a bill of interpleader had been filed raising facts like those in *Crawshay* v. *Thornton* (2), any judge of the Court of Chancery would have felt himself no longer bound by the somewhat narrow principle laid down by Lord Cottenham, L.C., but would have acted upon the fuller powers contained in that statute.

BRETT, L.J. I feel myself unable to agree with the decision in the High Court of Justice; the judgment was, in substance, that Field, J., had no power, under the circumstances of this case, to make an order, and that the facts do not fall within the Interpleader Acts. The ground upon which both Lord Coleridge, L.C., and Huddleston, B., relied, is that if the interpleader order were made, the remedy of the plaintiffs against Lopez would not be co-extensive with their remedy against the defendants; and the reason assigned, why the remedies would not be co-extensive, is that the plaintiffs may possibly recover, as against the present defendants, not only the value of the wine, but also damages; whereas as between them and Lopez the only contest would be as to the property in the wine: or, as it may be otherwise stated, the claims of the plaintiffs, as against Lopez, could be only a portion of their claims against the present defendants. I confess that I can see no ground for thinking that the plaintiffs are entitled, as against the defendants, to any damages save those which are ordinarily recovered in an action for conversion; however, I will assume that they have a valid claim for other damages, and that by virtue of some relation existing between the present plaintiffs and the

(1) Law Rep. 1 Ex. 261. (2) 2 My. & Cr. 1.

present defendants, and arising from either contract or estoppel, they can recover some amount from the defendants, which they cannot recover from Lopez. But even assuming the claims for damages to be valid, I cannot agree with the argument that these cases are not within the Interpleader Acts; I think that our decision must depend upon the language of those statutes, and I agree with Lord Justice Bramwell that the facts before us fall exactly within the terms of 1 & 2 Wm. 4, c. 58, s. 1. I do not think that the statutes apply merely where the opposing claims are co-extensive; I think that they bear a wider construction. Therefore it seems to me that Field, J., had jurisdiction to make the order. As to the authorities, in my opinion *Best* v. *Hayes* (1) and *Tanner* v. *European Bank* (2) are direct authorities against the proposition put forward on behalf of the plaintiffs. In *Tanner* v. *European Bank* (2) there was most certainly a contract between the plaintiff and the defendants, and in *Best* v. *Hayes* (1), if the claimant had not intervened, it would have been difficult for the defendant to shew that he was not liable upon a contract made with him as auctioneer; but in each case the question as to the property in the subject-matter in dispute was directed to be tried between the rival claimants. Therefore in the present case the question as to the property in the wine ought to be tried between the plaintiffs and Lopez. I cannot agree that in order to entitle a defendant to interplead, the remedy of the plaintiff against the claimant must be co-extensive with the remedy against him.

Lord Coleridge takes another ground, namely, that where one of two claimants to goods has been induced to alter his position through the representation of the person in possession of them, the latter is not entitled to relief under the Interpleader Acts. This view seems to suggest that the defendants by issuing the dock-warrants have estopped themselves from denying the plaintiffs' title to the wine; but Lord Coleridge can hardly have considered that an estoppel existed, because he rests this part of his judgment upon *Crawshay* v. *Thornton* (3), and that case rather seems to depend upon the circumstance that the plaintiff in the suit had entered into a kind of contract with one of the defendants. I

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129. (2) Law Rep. 1 Ex. 261.
(3) 2 My. & Cr. 1.

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cannot think that in this case there was any estoppel, but I confess that in my view, although a defendant in possession of goods may be technically estopped from denying the plaintiff's claim to them, yet if a bonâ fide claim is made to them by a third person, a judge ought to disregard the technical estoppel and to direct an issue under the Interpleader Acts, to try the question as to the property between the plaintiff and the claimant. However, as I am of opinion upon the facts before us that there was no estoppel, it is unnecessary to determine that point, but I must consider whether the principle upon which *Crawshay* v. *Thornton* (1) was decided ought now to be followed. I will not undertake to say whether, if the Common Law Procedure Act, 1860, s. 12, had not been passed, we ought still to act upon that decision; but it seems to me that after that enactment it is not a binding authority.

Therefore, upon neither ground can I agree with the judgments pronounced in the High Court of Justice. The appeal must be in substance allowed, and the defendants must have the costs which ought to follow the event. As we are bound under the new practice to do what the Court below ought to have done, we must hereafter hear the evidence to be adduced as to the title of Lopez.

May 8. An affidavit sworn by W. Speller, the agent in England for Lopez, and carrying on business in Mark Lane, London, was produced, and its substance may be shortly stated as follows:

In February, 1877, in consequence of an advertisement appearing in a newspaper, Speller went to the Charing Cross Wine Cellars, in Northumberland Street, Strand, and saw a man who represented himself to be Mr. Taylor, but whose name was subsequently discovered to be Alfred Ebenezer Schultz. This man represented himself as the proprietor of the business, and stated that he required wine in order to carry it on; he also at subsequent interviews informed Speller that he required wine for exportation to India, where he had customers. He gave orders to Speller, which the latter transmitted to Lopez in Spain. Lopez accordingly shipped the wine for London, and sent the bills of

(1) 2 My. & Cr. 1.

lading to Speller. Subsequently to giving the orders, Speller discovered that the person whom he supposed to be Taylor, was really Schultz, and was only an employé at the Charing Cross Wine Cellars; he thereupon demanded an explanation. Schultz admitted that his name was not Taylor, but stated that it was William Schultz, and further said that, although Taylor was the proprietor of the business, he knew nothing of the wine trade, and therefore he, Schultz, managed the business for him. Schultz further represented himself to be a man of large private means, and to have many customers. Being unable to learn upon inquiry that anything was known to the disadvantage of William Schultz, and believing the last-mentioned representation to be true, Speller handed in May, 1877, the bill of lading to Schultz. Speller afterwards discovered that Schultz was named Alfred Ebenezer, and not William, that he was a bankrupt and in poor circumstances, and that he was carrying on no business on his own account. The value of the wine was 1031*l*. A prosecution for fraud was thereupon instituted against Schultz, who was convicted at the Middlesex Sessions upon an indictment charging him with having obtained credit by fraud, contrary to the provisions of the Debtors' Act, 1869, and was sentenced to nine months' imprisonment with hard labour. Upon one occasion when Speller was at the Charing Cross Wine Cellars, he was introduced by Schultz to a man named Curtis, and was informed by Schultz that Curtis was a dealer in cigars, and supplied them to the cellars. Curtis gave Speller an order for wines, which was executed. Curtis said that he would introduce Speller to a customer, and appointed to meet him at a house in Charlotte Street, Portland Place. Upon going to the house, which proved to be a cigar shop with the name "Dolaro" on the window, Speller found there Curtis and two other men named Dolaro and Cohen; the two last-named appeared to be bargaining for the purchase of cigars. Dolaro was introduced by Curtis to Speller, and he gave Speller an order for wine to the value of 398*l*. Upon the representation that the wine was required by Dolaro for customers, Speller transmitted the order to Lopez, who caused it to be shipped, and by the bill of lading made it deliverable to the order of Speller; the bill of lading was indorsed by Speller and handed over to Dolaro. Subsequently Schultz stated to Speller that Cohen was a first-class man, and a

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wholesale cigar merchant, and that Speller need have no hesitation in trusting him. Cohen then gave Speller an order for wines to the value of 137*l.*, representing that he required them in the ordinary course of trade; Speller transmitted the order to Lopez in Spain, who caused the wines to be shipped, and by the bill of lading made them deliverable to the order of Speller; the bill of lading was indorsed by Speller and handed by him to Cohen. Speller subsequently ascertained that Dolaro was only a lodger at the house in Charlotte Street, that the house had been taken by Cohen, that the dealing as to the cigars between Cohen and Dolaro was merely a sham to deceive him, that both Cohen and Dolaro were merely men of straw, and that none of the wines ordered by them were required by them in the ordinary course of trade. The wines obtained by Schultz, Dolaro, and Cohen were pawned soon after the dock-warrants were issued. Curtis, Dolaro, and Cohen had absconded, and their whereabouts could not be ascertained. The wines claimed by the plaintiffs respectively in these actions were a part of the wines obtained from Speller by the fraudulent representations above-mentioned.

Cohen, Q.C. (*Sullivan*, with him), for Lopez. No doubt if the contracts made by Speller with Schultz, Dolaro, and Cohen, were merely voidable, Lopez would have great difficulty in maintaining his claim to the wine against the plaintiffs in these actions, because the contracts were not avoided until after the plaintiffs had obtained some interest in the wine; but it is submitted for Lopez that on the following grounds these contracts were wholly void: first, because, although Speller intended to sell, neither Schultz, Dolaro, nor Cohen intended to buy; secondly, because Speller intended to sell different portions of the wine upon separate contracts with these three persons, whereas they were acting in collusion with each other, and intended to obtain possession of the wine for their joint benefit; thirdly, because the plaintiffs have never had possession of the wine itself.

As to the first ground, it is submitted that there was no transfer of the property in the wine, for Schultz, Dolaro, and Cohen did not intend to buy, and did not really accept Speller's terms of sale.

[BRETT, L.J. They intended to buy the wine, but not to pay for it.

THESIGER, L.J. Speller dealt with the persons, with whom he really intended to deal; the facts of the present cases do not resemble those in *Cundy* v. *Lindsay*. (1)]

There was no assent by Schultz, Dolaro, and Cohen to the sale, and therefore there was no contract. The whole of the proceedings by these three persons was a mere scheme to obtain by fraud the possession of the wine; if a person obtains possession of goods by fraud without a contract, the property in them does not pass to him, as is plain from the view taken in the Exchequer Chamber of the facts in *Kingsford* v. *Merry*. (2)

[BRETT, L.J. Dolaro, Schultz, and Cohen did not steal the wine; they could not have been convicted upon an indictment charging them with larceny. They obtained possession of the documents representing the wine by false statements, which induced Speller to enter into contracts with them personally; it might have been different if he had parted with the documents under the belief that he was negotiating with persons whom Dolaro, Schultz, and Cohen falsely alleged that they were authorized to represent.]

As to the second ground, although Speller intended to enter into separate contracts with the three persons, they conspired to obtain the wine for their joint advantage; they intended to make themselves co-owners; the parties never were ad idem.

As to the third point, the plaintiffs have simply got possession of the dock-warrants, and a pledge of these documents is not equivalent to a pledge of the wine itself; a dock-warrant does not transfer the property in the goods to which it relates, as is plain from *MacEwan* v. *Smith* (3), *Johnson* v. *Credit Lyonnais Company* (4): it is not like a bill of lading; and the defendants have never attorned to the plaintiffs; it was merely an equitable interest or charge, and not the property which became vested in the plaintiffs, and according to the authorities an owner of goods obtained from him by fraud can be prevented from following them only when the property has vested in some other person. In order that a pledge may defeat the right of a defrauded owner, the chattel itself, and not the mere indicia of property, must be delivered to the pledgee. The rights of the plaintiffs lay merely in contract, and this is insufficient to bar the title of the true owner.

(1) 3 App. Cas. 459.
(2) 1 H. & N. 503; 26 L. J. (Ex.) 83.
(3) 2 H. L. C. 309.
(4) Ante, p. 32.

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Marriott, Q.C., and *W. Attenborough*, for the plaintiffs. It may be admitted that a dock-warrant does not pass the property in goods like a bill of lading; but the plaintiffs really advanced the money on the wine, and the dock-warrants were handed to them merely to enable them to get the wine transferred into their own names in the defendants' books. At the very least the plaintiffs had a special property in the wine, coupled with a constructive possession of it. The deposit of the dock-warrants with the plaintiffs was a constructive delivery of the wine: Benjamin on Sales, p. 573 (2nd ed.), and this is sufficient to vest a title in them. (1)

Watkin Williams, Q.C., for the defendants, was not heard.

Murphy, Q.C., for Lopez, in reply. It is admitted that it is an inconvenient course to decide the conflicting rights of the parties upon motion; an issue ought to be granted, in order that the facts may be clearly ascertained. If the plaintiffs have an equitable interest in the wine, so also has Lopez, who is the unpaid vendor; the equities are equal, and the question must be decided by the legal right to the ownership of the wine; that clearly remains vested in Lopez. At any moment Dolaro may be arrested, and afterwards may be tried and convicted on the prosecution of Lopez, under 24 & 25 Vict. c. 96, ss. 1, 88; in that event Lopez would be entitled to a restitution of the wines or their proceeds under s. 100 of that statute (2); it is rather hard upon him if he is summarily deprived of that remedy by these interpleader proceedings.

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BRETT, L.J. At the hearing on the 1st of May this Court, as then constituted, decided that these cases fall within the Interpleader Acts, and that inasmuch as this Court is bound to give the

(1) In the course of his argument Marriott, Q.C., observed that the present actions were unaffected by the Factors Act, 1877 (40 & 41 Vict. c. 39), as that statute was not passed until after the facts of these cases had happened.

(2) See *Scattergood* v. *Sylvester*, 15 Q. B. 506, a case of larceny, but the property stolen had been sold in market overt. In the course of the argument W. Attenborough informed the Court that when Schultz was convicted at the Middlesex Sessions, under the circumstances mentioned in Speller's affidavit, an order for restitution was asked for, but the presiding judge refused to grant it, on the ground that the Debtors Act, 1869 (32 & 33 Vict. c. 62), the statute under which Schultz was convicted, did not authorize him to do so.

judgment which the High Court ought to have given, it is necessary to determine the rights of the parties. We think that the defendants are entitled to relief, and the question to be now determined is, whether the claimant Lopez ought to be barred. At the former hearing the only affidavit produced before us on behalf of the claimant was one from his solicitor, who was unable to speak clearly as to the facts. At the present hearing we have before us an affidavit from Speller, his agent; nevertheless, even on the facts stated in it, we must decide against the claimant. Speller, as the agent of Lopez, was authorized to sell the wine: he was in possession of the bill of lading, and was authorized to hand it over to any person who should buy the wine. Speller was induced by fraud to enter into a contract of sale. He intended to pass the property in the wine to the pretended buyers, and for that purpose he handed to them the bill of lading. There was a complete contract of sale passing the property in the wine, although that contract was induced by fraud. The legal effect was the same as if the contract of sale had been entered into by Lopez himself. The property in the wine became vested in Dolaro and Schultz. It is true that upon discovering the fraud Lopez might have disavowed the contract; but before he could avoid it, Schultz and Dolaro entered into verbal contracts with the plaintiffs for advances upon the security of the wine, and professed to confer upon them a lien with a power of sale if the advances should not be repaid within three months. That was a contract to pledge, although the pledge itself was not completed. The plaintiffs advanced the money and received the dock-warrants in order that they might obtain either an actual or at least a constructive possession, and thereby render the pledge perfect. The defendants, however, refused to act upon the dock-warrants, and therefore the pledge has never been completed. The plaintiffs have nevertheless a good equitable right to the wine created by those in whom the property was for the time vested, and Lopez cannot now put an end to it by annulling the contract made on his behalf by Speller. Before he can receive the wine or its proceeds, he must satisfy the claim of the plaintiffs. After the lapse of three months they had, by virtue of the contract with Dolaro and Schultz, the power to sell; but they could only sell to repay themselves the

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amount of their advances and the costs of the sales. If Dolaro and Schultz had been honest persons, the plaintiffs would have been obliged to account to them for the difference between the amount representing their advances and the costs of the sale and the price which the wine might fetch. A similar principle must be applied as regards the claimant, and therefore the proper order will be that Lopez be barred upon the plaintiffs undertaking to account to him for the difference between the price at which the wines sell and the amount representing their advances, the costs of the sales, and the costs of the hearing.

COTTON and THESIGER. L.JJ., concurred.

W. Williams, Q.C., applied that the defendants' costs and charges might be a first charge upon the proceeds of the sale of the wine, and cited *Duear* v. *McKintosh.* (1)

BRETT, L.J. We think that the costs and charges of the defendants ought to be a first charge upon the fund.

Appeal allowed, the actions being stayed as to the wine and the claimant being barred. (2)

Solicitors for plaintiff, Percy Attenborough: *G. H. K. & G. A. Fisher.*

Solicitor for plaintiff, Robert Attenborough: *John Attenborough.*

Solicitor for defendants: *Hacon.*

Solicitor for claimant, Lopez: *E. D. Lewis.*

(1) 2 Dowl. 730; 3 M. & Sc. 174.

(2) The order of this Court (the formal parts being omitted) in the action brought by Percy Attenborough was drawn up in the following terms:—

"The plaintiff hereby undertaking to account to the said Diego Lopez for the surplus proceeds of the sales of the wines over his advances and interest, and the costs of sales, and the costs of the former hearing as well as of this hearing, it is ordered that the said claimant, Diego Lopez, be barred; and it is further ordered that upon payment by the plaintiff to the defendants or their solicitors of the costs of the defendants in the interpleader proceedings and their charges, which costs and charges are to be a first charge on the wines, the defendants to deliver the wines to the plaintiff or his purchasers on his order, and that on delivery of the wines to the plaintiff's order this action be stayed as to the plaintiff's claim for the wines."

The order in the action brought by Robert Attenborough was drawn up in similar terms.

[IN THE COURT OF APPEAL.]

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Marine Insurance—Constructive Total Loss—Abandonment, Notice of—Ship, Sale of.

Where the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold.

ACTION on a policy of marine insurance to recover a salvage loss of 94*l.* 11*s.* per cent. under a Lloyd's policy for 4000*l.* on the ship *Amiral Protet*, for six calendar months from the 4th of October, 1870.

At the trial before Lord Coleridge, C.J., during the Hilary Sittings, 1877, in London, the following facts were proved:—

The plaintiff is a merchant residing at Zurich, and a partner in the firm of Kaltenbach, Engler, & Co., trading at Singapore and Saigon, and the registered owner of the *Amiral Protet*. (1) The defendant is an underwriter at Lloyd's, and subscribed the policy on the *Amiral Protet* for 100*l.* On the 14th of January, 1871, the *Amiral Protet* sailed from Saigon with a cargo of rice for Hong Kong. On the 22nd of January, while on that voyage, she struck on the Britto Bank. She was got off the same day, and brought back to Saigon on the 24th of January. She was surveyed on the 28th of January, and a further survey was made on the 3rd of February when she was in dry dock. The surveyors reported that the expense of the repairs would exceed the value of the ship when repaired, and they consequently condemned her as a constructive total loss. On the 7th of February she came out of the dry dock, and was anchored in smooth water, and there was no evidence to shew that the vessel was in imminent danger of perishing, or that there was any immediate necessity for the sale. She was, however, by order of the Saigon firm, on the 23rd of February

(1) The plaintiff, being a naturalised British subject, was the registered owner; but the firm, it appeared, were the real owners of the vessel.

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sold by public auction for 1600 dollars. She was purchased by a Chinaman, repaired at an expense of fifty dollars, and sent down to Singapore, where she was resold. She was subsequently further repaired for about 500*l.*, and made a ship fit to carry dry cargoes. The following correspondence was put in evidence at the trial:—

On the 30th of January, 1871, the firm at Saigon wrote to the firm at Singapore, giving the details of the disaster, and on the 31st of January the Singapore firm forwarded that information to the plaintiff by letter, and added, "as the ship and freight is pretty well insured, it would not be so distasteful to us if the ship should be condemned; if this should happen we will inform you by telegraph as soon as we get particulars." On the same day the master of the vessel, Grant, wrote to the Singapore firm announcing that the vessel had run on shore at Britto Bank, and stating that "a survey was passed on board from Lloyd's on Saturday last, and they report the vessel is in very bad condition, and recommend that she be put in dock to examine her bottom . . . . It is more than probable that the survey in the dock will recommend that she be condemned, but I shall await your instructions before taking any final steps."

On the 3rd of February, Grant, from Saigon, wrote to the Singapore firm: "The *Amiral Protet* is in dock, and the final survey was passed upon her this morning. The report of the surveyors is that such is the state of the vessel from injuries received, and the repairs required to put her in good condition are such that it will cost at this port from 18,000 to 20,000 dollars to effect them, and that it will take four months to finish her. . . . The survey reports recommend the vessel to be sold for the benefit of the underwriters. I may further state that the vessel in her present state is not in a fit state to leave the port to go to another."

On the 3rd of February Waterson & Bailey, the surveyors, made a report of their survey of the ship and recommended a sale; this report was duly forwarded by the Saigon firm to the Singapore firm.

On the 7th of February the Singapore firm wrote to Grant that they had received his letters of the 30th of January and the 3rd of February, and stated:—

"When the surveyors called by the agents of the English Lloyd's further state that the vessel in her present state is not fit to leave the port to go to another port to undergo repairs there, I think it is the best when you follow the advice of the surveyors, and let the vessel be sold. . . . When I could have any idea what the repairs of the *Amiral Protet* would cost here, I would telegraph to the insurance in England, and ask for their advices if we shall order the vessel down for their accounts and repair her here, but as you say she is not fit to go to sea it is impossible to bring her down . . . it is much more in the interest of the insurance to sell her there."

On the 7th and 8th of February copies of the letters from Grant to the Singapore firm were forwarded by them to the

plaintiff, the writers stating "that we could not be so very sorry if the vessel should be condemned and left for account of the underwriters."

On the 27th of February the Singapore firm wrote to I. C. im Thurn, of London, the plaintiff's insurance-brokers, as follows:—

"We are sorry to inform you that at a survey held on the *Amiral Protet* in the Government Dock in Saigon it has been found that the damages are so serious that it would cost from 18,000 to 20,000 dollars to repair the same, and that the repairs would take four months' time. As Government cannot place the dock at the ship's disposal for such length of time, the same being more specially reserved for repairing men-of-war; considering, also, that in her present state she could not sail for some other port for repairs, and as the cost of repairs would have exceeded the amount insured on her, the surveyors recommended that the *Amiral Protet* should be sold for account of the underwriters, and the sale was to take place on the 23rd. We do not know as yet how the sale has turned out. Kindly inform the writers of the above facts, and tell them that we shall send in the average documents as soon as possible. P.S.—We have just learnt from Saigon that the *Amiral Protet* has been sold at public auction for the sum of 1600 dollars."

The information contained in this letter was forwarded to the plaintiff at Zurich, and it was alleged that notice of abandonment was given to the underwriters on the 10th of March.

At the close of the plaintiff's case it was contended, on behalf of the defendant, that the plaintiff could not recover for a constructive total loss, for the plaintiff had not given any notice of abandonment. It was contended, on behalf of the plaintiff, that it was a question for the jury whether there was a constructive total loss; and if they so found, it was a further question for them whether, if the underwriter had received notice of abandonment, he could have taken any other course than that the plaintiff had adopted, or could have obtained any advantage from the notice of abandonment.

Lord Coleridge, C.J., ruled that a notice of abandonment was a condition precedent to the plaintiff's right to recover, and directed judgment of nonsuit to be entered.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the judge wrongly determined and misdirected the jury in holding that on the facts proved at the trial the plaintiff was not entitled to recover as for a total loss, and in holding and directing that as matter of law a notice of abandonment was

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necessary, and in withdrawing all questions of fact from the determination of the jury.

The rule was twice argued: first, before Grove and Lopes, JJ., by Butt, Q.C., Cohen, Q.C., and Hollams, for the defendant, and Sir H. James, Q.C., W. Williams, Q.C., and Mathew, for the plaintiff; and a second time by the same counsel before Grove, Denman, and Lopes, JJ. The Court considered that there was some evidence which ought to have been left to the jury, and ordered a new trial.

The defendant appealed.

May 31, June 3. *Cohen, Q.C.*, and *Hollams*, for the defendant, contended that there was no constructive total loss, and that there was no notice of abandonment before sale. They cited *King* v. *Walker* (1); *Farnworth* v. *Hyde* (2); *Farnworth* v. *Montefiore* (3); *Rankin* v. *Potter* (4); *The Oriental.* (5)

W. Williams and *J. C. Mathew*, for the plaintiff, contended that, first, on the facts proved at the trial it was not necessary to give any notice of abandonment, and it was a question for the jury if notice had been given whether it would have been of any use to the defendant; secondly, if a notice were necessary, that notice had been given. They cited *Cobequid Marine Insurance Co.* v. *Barteaux* (6); *King* v. *Walker* (7); *Roux* v. *Salvador* (8); *Dent* v. *Smith.* (9)

June 4. BRETT, L.J. This case raises the questions of abandonment and notice of abandonment on a policy of marine insurance. Before I enter upon the merits of the present case I think it desirable to state my view of the law.

I agree that there is a distinction between abandonment and notice of abandonment, and I concur in what has been said by Lord Blackburn (10), that abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of

(1) 3 H. & C. 209; 33 L. J. (Ex.) 325; 34 L. J. (C.P.) 207.
(2) 18 C. B. (N.S.) 835.
(3) Law Rep. 2 Q. B. 511.
(4) Law Rep. 6 H. L. 83.
(5) 7 Moo. P. C. C. 398.
(6) Law Rep. 6 P. C. 319.
(7) 3 H. & C. 209; 33 L. J. (Ex.) 325.
(8) 3 Bing. N. C. 266.
(9) Law Rep. 4 Q. B. 414.
(10) *Rankin* v. *Potter*, Law Rep. 6 H. L. at p. 118.

indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity. The doctrine of abandonment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss; but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place; as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of *Roux* v. *Salvador* (1), but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before.

With regard to the notice of abandonment, I am not aware that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused. How, then, did it arise that a notice of abandonment was imported into a contract of marine insurance? Some judges have said it is a necessary equity that the insurer, in the case of a constructive total loss, should have the option of being able to take such steps as he may think best for the preservation of the thing abandoned from further deterioration. I doubt if that is the origin of the necessity of giving a notice of abandonment. It seems to me to have been introduced into contracts of marine insurance—as many other stipulations have been introduced—by the consent of shipowner and underwriter, and so to have become part of the contract, and a condition precedent to the validity of a claim for a constructive

(1) 3 Bing. N. C. 266.

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total loss. The reason why it was introduced by the shipowner and underwriter is on account of the peculiarity of marine losses. These losses do not occur under the immediate notice of all the parties concerned. A loss may occur in any part of the world. It may occur under such circumstances that the underwriter can have no opportunity of ascertaining whether the information he received from the assured is correct or incorrect. The assured, if not present, would receive notice of the disaster from his agent, the master of the ship. The underwriter in general can receive no notice of what has occurred, unless from the assured, who is the owner of the ship or the owner of the goods, and there would therefore be great danger if the owner of a ship or of goods—that is the assured—might take any time that he pleased to consider whether he would claim as for a constructive total loss or not—there would be great danger that he would be taking time to consider what the state of the market might be, or many other circumstances, and would throw upon the underwriter a loss if the market were unfavourable, or take to himself the advantage if the market were favourable. These are the reasons why I think the assured and the underwriters came to the conclusion that it should be a part of the contract and a condition precedent that, where the claim is for a constructive total loss, there must be notice of abandonment, unless there were circumstances which excused it.

Notice of abandonment, therefore, being a part of the contract, questions arose as to the time when that notice should be given. The first question which arose was whether the notice must be given at the first moment that the assured heard of the loss, or at some subsequent period. It was, however, decided that it is not at the moment of the first hearing of the loss notice of abandonment must be given, but that the assured must have a reasonable time to ascertain the nature of the loss with which he is made acquainted; if he hears merely that his ship is damaged, that may not be enough to enable him to decide whether he ought to abandon or not; he must have certain and accurate information as to the nature of the damage. Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss; as, for instance, if he hears his ship is captured in time of war, it

must be obvious to everybody, unless the ship is re-captured, it would be a total loss; or if he hears that the ship is stranded, and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is, that immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there be some reason to the contrary, give notice of abandonment; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he has a reasonable time to acquire full information as to the state and nature of the damage done to the ship.

But then there arose another question. Ships, or goods, or the subject-matters of marine insurance, are liable to danger at various parts of the globe, where neither the assured nor the underwriter is present; and upon the emergency the master of the ship being there alone, must act. Now, under those circumstances, masters have often sold either ship or goods; and masters have had to consider whether they would sell the ship or goods even in cases where such ship or goods are not insured. The general rule with regard to the propriety of a master selling the ship or the goods, is that he has no right to sell either the ship or the goods without the consent of the owner, but if necessity arises the master becomes what is called, from the necessity of the thing, the agent to bind his owner by a sale, or to bind the owner of goods by a sale. Now, the rule I should say from the necessity of things, at all events from the justice of things, is this, that if the circumstances are such that any reasonable person having authority from the owner would sell, then the master is entitled to sell, although he has not such authority. The question, I think, as between the person to whom a master sells and the owner of the property, is whether the circumstances were those which would have caused a reasonable owner, had he been present, to sell. If that state of things exists, the master has authority to sell, and his act is binding upon the owner of the ship or goods. Where, therefore, there has

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been a constructive total loss of either ship or goods, circumstances may have arisen which would justify the master in selling, or they may not; there may be a constructive total loss without any sale, and there may also be a constructive total loss accompanied by a sale. If the first information which the assured, not being present, has of the damage which has occurred to his ship, or being the owner of goods of the damage which has occurred to his goods, although they were not an actual total loss by reason of the perils of the seas, is accompanied also by information that the master has sold, and if the circumstances of that sale were justifiable, so that the property passed to the vendee, under those circumstances that is the time when, if at all, the assured would be bound to give notice of abandonment; and in some of the earlier cases it was considered that even then the assured must give notice of abandonment; but in others that doctrine seems to be questioned. In *Rankin* v. *Potter* (1) the law was established that where at the time when the assured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject-matter of the insurance has been sold so as to pass the property away, inasmuch as there was nothing of the subject-matter of the insurance which he could abandon, notice of abandonment was not necessary. No doubt the reason given for this was that notice at that time and under such circumstances would be a mere idle ceremony; it could be of no use. That was the point decided in *Rankin* v. *Potter*. (1) In those particular circumstances it was held that notice of abandonment need not be given because there was nothing to abandon. That in one sense is true; but if goods had been sold it is obvious there must be something to abandon, that is the proceeds of the sale; the money which is the proceeds of the sale, when the insurance is settled, is abandoned; but where there is nothing of the subject-matter of insurance to abandon, there is no ship to abandon, there are no materials of the ship to abandon, there are no goods to abandon, notice of abandonment under those circumstances was said to be futile. But *Rankin* v. *Potter* (1) went no further; it did not decide —because the point was not raised—that if, at the time when the assured had to make up his mind and when otherwise he ought to

(1) Law Rep. 6 H. L. 83.

abandon, there was no sale of the subject-matter of the insurance, the assured would be excused from giving notice of abandonment if he was able to shew that, had he given such notice, in the result it would have turned out to be of no use. It was argued before us that the necessary inference to be drawn from *Rankin* v. *Potter* (1) was, although there had been no sale of the subject-matter of the insurance when information of the disaster was received by the assured, yet if he could shew that before any notice of abandonment could reach the underwriter and before the underwriter's orders could reach the assured a sale could take place, so that had the assured given notice of abandoment such notice would have been of no use to the underwriter, the assured would be excused from giving it. That point, however, is not raised here, and therefore it becomes unnecessary to decide it. I am not prepared to say that if it could be shewn that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not; that is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

Having stated my view of the law, I proceed to apply it. In the present case the ship was grievously injured, and, I think, in order to consider the ruling of Lord Coleridge, C.J., we must take it for the purpose of the argument that she was so much injured that there was imminent danger of her becoming a total loss, and I think we must take it she had sustained damage to this extent, that she was what is called a constructive total loss, that is to say, that she was in such a condition that the assured would be, if he fulfilled all other conditions, in a position to claim for a constructive total loss. We must not forget that the ship must be in a

(1) Law Rep. 6 H. L. 83.

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condition to justify what was done afterwards, otherwise the fact of sale or the fact of giving notice of abandonment had no effect whatever. A sale cannot make a total loss; notice of abandonment cannot enable the assured to recover for a total loss unless the sale was justifiable by the circumstances, and the circumstances were such as to justify a person in claiming for a total loss. The constructive total loss, in other words, must exist before either the sale or the notice of abandonment; the circumstances must be such as to justify it. I think we must take it the ship was in such a condition, that the assured was entitled to abandon, and to claim for a total loss, but for a constructive total loss only: the questions then are, first, whether the assured was excused from giving notice of abandonment, and, if not, whether he gave any notice of abandonment; and, secondly, if he did give notice of abandonment, whether he gave it within the legal time, because if he gave the notice, yet if he did not give it within the legal time, he cannot recover as for a total loss.

It was argued before us that this was an actual total loss. I do not stop to enter into that; it is clear that the ship was not an actual total loss; but I think we are bound to take it that she was a constructive total loss; that is, she was in imminent danger of becoming a total loss to her owner. She may become a total loss to her owner either by perishing, although she has not yet perished, or she may become a total loss by reason of the cost of the repairs being greater than the value of the ship when repaired; in either case she becomes a total loss to her owner. I think we must take it that the circumstances were such that the owner had a right to consider that in all probability the cost of repairing that ship would be greater than her value when repaired, and that she would become a total loss. Therefore he was justified in assuming there was imminent danger of her becoming a total loss, and he would, according to the rule I have enunciated, the moment he received information which would lead any reasonable man to come to that conclusion, be bound to give notice of abandonment unless he was excused.

The owners who were in truth the real assured were a firm, some of whom were resident at Singapore, and the owners resident at Singapore were bound to act in the matter of this insurance

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and claim. On the 7th of February those owners at Singapore received certain information as to the condition of the ship, and they did not in fact receive any material additional information after that time, and upon that very information which they received they did eventually act, in resolving to abandon the ship and in giving notice of abandonment, if any notice was ever given. It is clear that, unless they were otherwise excused, on the 7th of February they had such information with regard to this ship as shewed that she was in imminent danger of becoming a total loss, and that at that time they were bound to act upon it, and to make up their minds whether they would abandon or not, and if they made up their minds to abandon, to give notice of abandonment. That being the state of things, on the 7th of February the ship was not sold. Therefore the case is not within the rule in *Rankin* v. *Potter*. (1) They did not receive notice of such damage as made it imminent that the ship might become a total loss, and at the same time notice that the ship was sold, but they received the information of the damage that had happened to the ship before they received information that the ship was sold. But it is said that at that time the ship was in such a condition that, before any answer to a notice of abandonment could be received from the underwriter, a reasonable man might have sold her. I do not enter into that consideration, because that is not the rule by which the case is governed. It was said that the assured ought to have sent forward the information by telegraph. If the telegraph was in use and known by the majority of persons in business to be in use between Singapore and Europe, it is clear the information ought to have been telegraphed to the underwriter in London, but if that was not so, then it would be justifiable to send the information to Europe by letter; but however that may be, there is no evidence to justify a jury in saying that the ship would actually have perished as a ship before an answer could be returned. Therefore it seems that that point which has been put to us did not arise in this case. It would appear the owners had notice of the imminent danger of the ship on the 7th of February, and the case is not brought within *Rankin* v. *Potter* (1); therefore the owners ought to have given notice of abandonment immediately

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after the 7th of February. They ought to have sent forward that notice unless circumstances prevented them. When I say that they were bound to send notice immediately to the underwriters, it must be subject to this, that if there was no post for a fortnight, "immediately" then is extended into a fortnight; but they would have no right to let a post pass, neither would they have any right to do what they did, which was not to send notice to the underwriters, not to send notice to an agent to inform the underwriters, not to send instructions to anybody to abandon the ship, but to send forward a mere report stating the circumstances about the ship to their co-owner at Zurich, not to tell him to abandon, but leaving it to him to consider whether he would abandon or not. The owners at Singapore might have intended to act in perfect good faith to the underwriters, but they made this mistake: instead of sending to the underwriters or to the agent of the underwriters notice of their intention to abandon, they did neither one nor the other, but they only sent forward a communication to their co-owner, in order that he should determine whether he would abandon or not. They failed to send notice of abandonment, and the question does not arise of within what time notice of abandonment was given. But it was assumed by Lord Coleridge, C.J., and therefore we must take it, either that on the 11th of March the underwriters received the notice, or that it was on the 11th of March the assured resolved to send and did send the notice; but even if the underwriters received it on the 11th of March, there is the fatal gap between the time when the owners at Singapore received that information and the time when the owner at Zurich made up his mind to act upon it. It was the owners at Singapore who ought to have acted, and they ought either on the 7th or by the next post or the next telegraph to have sent forward notice to the underwriters, or at all events instructions to some agent of theirs to give notice to the underwriters, because the only mode of abandonment in cases of marine insurance is to give notice of abandonment, and the assured is bound to give notice. It is the notice which is the symbol of the abandonment. That notice must be given within a particular time. In this case it is obvious it was not. Therefore, although it must be assumed there were circumstances which entitled the

assured to treat the loss as a total loss, and although it must be taken that at some time or other he did give notice of abandonment, yet in my opinion the evidence was beyond dispute that he did not give notice of abandonment at the proper time, and the giving notice in proper time, unless some excuse exists, is a condition precedent. No such excuse existed in this case. Therefore Lord Coleridge was right in saying that the plaintiff could not recover. The judgment of the Common Pleas Division, with great deference, was wrong. The Court carried the words of Lord Blackburn in the opinion which he gave in *Rankin* v. *Potter* (1) too far. They carried them further than the decision required, and I cannot help thinking they carried them further than Lord Blackburn intended them to be carried. This appeal must therefore be allowed.

COTTON, L.J. This is an action upon a policy of marine insurance, and the question we have to consider is whether Lord Coleridge, C.J., was right in saying there was no question for the jury, and that the plaintiff could not recover for a constructive total loss, on the ground that he had not given notice of abandonment. The Common Pleas Division decided that the case ought to go down for a new trial, in order, as I understand their decision, that the jury might be asked whether or no, if notice of abandonment had been given, it would have been, in the result, of any use to the underwriters. Although the claim was for a total loss, yet the ship existed as a ship, notwithstanding the damage it had sustained. For the purpose of our decision, we must consider the damage was such that the shipowner was entitled to treat it as a constructive total loss, and on that footing to claim on the policy as for a total loss. A "constructive total loss" is when the damage is of such a character that the assured is entitled, if he thinks fit, to treat it as a total loss. When, as in the present case, the assured elects to treat the loss as a total loss, he is bound to transfer to the underwriters the subject-matter insured. The general rule is that he must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon two

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grounds: when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore, the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to. How, then, can the plaintiff say that it was not necessary in the present case to give notice of abandonment?

It is suggested that, if the jury should find that the notice would have been useless, that excuses the assured from giving such notice. It is unnecessary to consider what would be the result if, at the time the assured received notice of those facts which led him to treat it as a constructive total loss, he also knew that the circumstances were such that, if he communicated with the underwriters and waited for their answer before taking any action, the thing insured would cease to exist and be entirely lost. I think so, because, although it was suggested that there was such stringent necessity in this case for the sale of the ship, that if it had not been sold it would have perished, there is no evidence to support the contention that the ship was in this imminent danger.

Therefore, the question must be considered upon the assumption that there being no such stringent necessity for selling the ship to save her from being entirely lost, a jury might possibly find that communicating with the underwriters would have produced no useful result. It was suggested that it followed from *Rankin* v. *Potter* (1) that if the notice of abandonment was of no use to the underwriter, the assured was excused from giving it, but, in my opinion, nothing that was said by the learned Lord who moved the judgment of the House, or by any of the judges, supports that contention. In that case, the policy in question was a policy on

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freight, and at the time the assured received notice of the loss, he also received notice that it was impossible to earn the freight, and they decided that if at the time when the assured received information to enable him to claim for a total loss, he also hears that the thing has been sold or gone out of his power, that does excuse notice of abandonment, but they decided no more than that. There is nothing in the observations of Blackburn, J., which can possibly be construed to mean that, where the assured has in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters.

On principle, ought we to carry what was laid down in *Rankin* v. *Potter* (1) further than that case has carried it? In my opinion, no. All the grounds upon which the rule requiring notice of abandonment to be given is based apply equally in this case, even although the jury might find that in the ultimate result notice of abandonment would have produced no good result to the underwriters. The object is, as I have pointed out before, to communicate to the underwriters that decision at which the assured has arrived at the earliest possible moment, so as to render it impossible for him, having formed that decision, to retract it, and in order that he must not be allowed to run the chance of events, and to abstain from giving notice, and afterwards excuse himself by saying, "If I had given notice the underwriters would have got no benefit from it;" and from the other ground on which notice is required it equally follows that it must not be left to the jury to say whether or no notice would be useful. Suppose, for various reasons, the ship in this case had not been sold for two or three months, it is obvious, if there had been notice to the underwriters, they might have done something, and we must not depart from the general rule laid down for all cases simply because in a particular case a jury might find that notice would have produced no good result. I think, that where the assured at the time he receives the information on which he is bound to make his election has the thing insured in his power or under his control, he is bound to give notice to the underwriters. I give no opinion upon the question which arises when the state of the thing insured is

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such that before the communication could have reached the underwriters it must, so far as human probability goes, have ceased to be in specie.

In my opinion therefore it was necessary that due notice should be given to the underwriters. Was notice given? The facts are that one of the owners of this vessel was at Singapore and had full authority to act for his co-owners. It is shewn that he, in a letter of the 7th of February to the master of the ship, does tell him to follow the advice of those who have surveyed the vessel and sell. This owner being at Singapore, received, on the 7th of February, information of the survey which had then taken place, and that survey and that letter which he received on the 7th of February did give him not only all the information necessary to enable him to make his election; but the information upon which, in fact, he did make his election to treat it as a constructive total loss. Then there follows some direction to get a surveyor's opinion whether the ship could or could not, without repairs, come down to Singapore; the captain stated he thought she could not, but the owner wished it to be put in the report. It is said that shewed he had not made his election to abandon, and wanted further information. That, however, is not so; for in that letter he is dealing with that vessel as one that was in future to be dealt with only for the benefit of the underwriters, and not by the owners for their own benefit.

There is no evidence as to what notice was given or when it was given, but it seems to have been conceded at the trial that notice was given on the 11th of March. If so, that was the first notice which was given by the assured to the underwriter. If the letter of the 30th of January gave all the necessary information to the owner at Singapore which enabled him to judge whether he would elect to abandon or not, then he ought at once, or within a reasonable time, to have given notice to the underwriters, and not simply to have sent that letter to Europe without any instructions, and to have left it to the agent to decide what he would do. But, at any rate, the letter of the 3rd of February, received on the 7th, was a letter which gave the full information. I am of opinion that notice given on the 11th of March would not be given in reasonable time after the 7th of February. I am of opinion that the judgment of

Lord Coleridge, C.J., was right, and that the question which the Court of Common Pleas thought ought to have been left to the jury ought not to have been left to them.

THESIGER, L.J. I am of opinion that the judgment of Lord Coleridge, C.J., was right, and should be affirmed. The plaintiff seeks to recover in respect of a constructive total loss. It is impossible, upon the facts which have been admitted at the trial, for him to put his case higher, and, on the other hand, the underwriter, the defendant, does not contend that the facts admitted were not sufficient to entitle the assured to treat the loss which did occur as a constructive total loss. That being so, it was incumbent on the assured to prove one of two things: either that he abandoned and gave notice of the abandonment immediately upon his receiving full information of the loss; that is to say, as soon as he had before him all the materials upon which he might properly be called upon to make his election; or that the circumstances of this particular case were such that they rendered the giving of notice of abandonment useless and unnecessary.

Now, at the trial before Lord Coleridge, C.J., the plaintiff adopted the latter alternative, and it was urged on his behalf that the sale of the vessel, which was the subject of the insurance, upon the 23rd of February, was a reasonable and prudent sale; that the communication of the fact of that sale being about to take place could not reach the underwriters in time to enable them to take any advantage of it, or to give any orders in reference to the vessel, and that consequently the case was within the decision in *Rankin* v. *Potter* (1), and therefore that notice of abandonment was not necessary. Lord Coleridge, C.J., assumed, as he was bound for the purpose of the case to assume, that the sale was reasonable and prudent, but held, and I am of opinion rightly held, that notwithstanding that fact it was incumbent upon the assured to give notice of abandonment. Now, in the first place, it is to be observed that at the root of the contention of the assured lies the question of fact, whether or not it was impossible for him to have communicated to the underwriters, in time to enable them to take any advantage of the

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communication, and even upon that point it appears to me, and I should be perhaps prepared so to decide if it were necessary to decide the point, that the assured has failed to establish any such impossibllity. Upon the 7th of February he received full materials upon which to exercise his election to abandon. A system of telegraphic communication existed, and as far as one can see had existed for some time between Singapore and London, and it was not unreasonable, or rather it was reasonable, that communication should be made under certain circumstances by the assured to the underwriters. This is made plain by the evidence of the plaintiffs themselves, because in the letter of the 7th of February, written by the firm at Singapore to the master of the vessel, they say that in certain events which are mentioned in the letter, and to which I need not more particularly refer, they propose to telegraph to the underwriters. But it appears to me unnecessary to decide this case on that question of fact, and I will assume for the purpose of the further discussion of the case that it might reasonably be said that the question, whether or not the assured ought to have used the telegraphic communication with the underwriters, was a question of fact which ought to have been left to the jury. But then arises the question whether, assuming that to be the case, the facts proved at the trial bring this case within the decision of *Rankin* v. *Potter* (1). Now, in using the words, "within the decision," I do not wish to be misunderstood. I quite admit that this Court is equally bound by any principle of law clearly enunciated by the House of Lords and treated by them as the basis of their decision, but admitting that to the full, what is the principle which is to be collected from that case? Putting it as high as it can possibly be put in favour of the plaintiff, it seems to me to come to no more than this, that when at the time that the assured properly elects to treat a loss as a total loss, a constructive total loss, there is no possibility of the insurers deriving any advantage from the notice of abandonment; in that case the assured need not go through what has been termed the idle ceremony of giving such a notice. I say putting the principle as high as it can be put in favour of the plaintiff, because when the opinions of the learned law Lords in that case are considered

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I think it will be found clearly that the principle laid down did not even extend as far as I have suggested. I think it would be convenient, while I am upon that point, to refer to two or three passages of the opinions of the Lords as bearing out the view which I have propounded. Lord Chelmsford (at p. 157) says this: "In *Farnworth* v. *Hyde* (1) under similar circumstances of the loss of the ship insured, and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position." Stopping at that point of Lord Chelmsford's opinion, it is clear he is not laying down the principle as an absolute principle to be applied to all facts and circumstances, but is laying it down to be applied to the case when at the time the assured received notice of the loss, he also received notice that the subject-matter of the insurance was no longer in specie, and therefore, although there was something to abandon, that is to say, the produce of the sale, there was no part of the matter insured that could by any possibility be abandoned to the underwriters. Then, again, Lord Colonsay (at p. 161) says this: "I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the notice of the abandonment is given, and he could gain nothing by it, then it is not necessary to give that notice." And Lord Hatherley (at p. 165), after dealing with the argument which had been urged on behalf of the underwriters, to the effect that they were under all circumstances and all states of fact to be the judges whether notice of abandonment could or could not be of any service to them, says: "I apprehend that certainly no authority has been cited to shew that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly accrue to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the

(1) 18 C. B. (N.S.) 835.

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ship when repaired, then there being something in esse to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportunity of making the best use they can of what remains." Further on he says: "But in this case there is nothing suggested (except one single point which I will notice in a moment) as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured." Then it is said there is something to be collected from the language of Blackburn, J., in his opinion to the House of Lords, from which it may be inferred that the principle laid down can be further extended. Now, in the first place, it is to be observed that the opinion of Blackburn, J., delivered to the House of Lords is not a binding authority upon us, and although the opinion is very valuable for the purpose of guiding us, we have to look at the opinions of the Lords, and not the opinions of the judges given to the Lords; but, at the same time, I think I may also say that when the whole opinion of Blackburn, J., is looked at, it does not justify the contention which has been raised on behalf of the plaintiff, and without taking up time by reading passages from that opinion, I would say that it goes no further than the opinions of the Lords themselves; that where at the time that the assured receives notice of the loss and has to exercise his election to abandon, there is no part of the subject-matter of the insurance to abandon, and therefore no possibility of an advantage to the underwriters if they did receive the notice; in that case the assured may be discharged from the onus, which otherwise would lie upon him, of giving a notice of abandonment; and when one considers the lengths to which the principle might be carried if the argument on the part of the plaintiff in this case could be supported, I think that, in the absence of authority, it is impossible to hold that it would be proper to find in favour of that contention. One can see that if at any moment an assured, who is entitled to treat a loss as a constructive total loss, may at the same time absolve himself from the necessity of giving notice of abandonment by selling the vessel, which although a prudent course is not a necessary course, it would lead to the greatest danger of frauds upon the underwriters, and at all events

to very considerable inconvenience in reference to policies of marine insurance.

Now what are the facts in this case? I have not heard any evidence whatever which has been put before Lord Coleridge, C.J., or which has been put before us, to the effect that there was any absolute necessity for the sale of this vessel, and although it is admitted that the vessel was a constructive total loss in this sense, that the cost of repairs to the vessel would be greater than the value of the vessel when repaired, I cannot trace any evidence to the effect, that if the sale of that vessel had been postponed even for two or three or four months, she would have ceased to exist in specie or that the loss from a constructive total loss would have become an actual total loss. If that be so, then upon principle and authority it appears to me that the plaintiff is not entitled to use the fact of that sale as a reason for excusing himself from giving a notice of abandonment.

Then the only remaining question which has also been argued before us, although it does not appear to have been raised before Lord Coleridge, C.J., at the trial, is, that the plaintiff did, as a matter of fact, elect to abandon within a reasonable time, and did give notice of abandonment to the underwriters also within a reasonable time.

Now, how stand the facts upon that question? For the purposes of the trial, and for the purposes of the judgment of Lord Coleridge, C.J., an imaginary date of giving notice of abandonment, namely, the date of the 11th of March, appears to have been taken by both parties as a datum, but in point of fact no notice was given at any such date, and both parties when arguing before us have gone behind that date; and while on the part of the plaintiff it has been contended that really notice of abandonment was given at an earlier date, and immediately upon the receipt of full information of the loss, upon the part of the defendants it has been urged that no notice of abandonment was given by any earlier communication than the letter of the 27th of February, which was written by the plaintiff's firm at Singapore; and when the other letters, namely, those of the 31st of January and the 7th of February,—which, be it observed, were not letters sent to the agents of the assured in London for the purpose of

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being communicated to the underwriters, but were letters sent to the plaintiff on the record at Zurich;—when the terms of those letters are read and considered, it is obvious that, so far from those being letters suggesting to him the giving notice of abandonment, they were only letters giving him such information as the plaintiff's firm at Singapore themselves had, with the statement that he would receive further information, as they themselves received it, and it appears to me clear that, even if the letter of the 27th of February itself can be considered as a notice of abandonment, that at all events is the first notice which can be said to have been given to the underwriters.

Let us examine the matter further. On the 7th of February the plaintiff's firm at Singapore had full information as to the loss and all the materials upon which they might perhaps have relied to elect whether they would abandon, in other words, whether they would treat the loss which had been sustained as a partial loss or as a constructive total loss. I need not refer more in detail to the letter written by the Singapore firm to the master of the ship. I would merely say that the whole purport and scope of that letter shews that while they were considering the question of a complete condemnation of the vessel with reference to the further question, whether the vessel should be taken to Singapore and there repaired on behalf of the underwriters, so far as regards the question of constructive total loss, the plaintiff's firm themselves considered that they had had full information as to the nature of the loss, and such information as they were prepared to act upon in treating that loss as a constructive total loss. If that be so, then the plaintiff is in this dilemma, either he elected to abandon on the 7th of February, or concurrently with the order for sale, or the sale on the 23rd of February, or not till after that sale. If he elected to abandon on the 7th, then no facts have been proved on the part of the assured to account for the delay between the 7th of February, when the assured elected to abandon, and the 27th of February, when for the first time he sent forward the notice of abandonment. On the other hand, if we take the date of the 23rd of February as the date of the election to abandon, and à fortiori if we take any date after the sale on the 23rd of February, then the plaintiff is in this difficulty, the assumption is

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that he had full materials upon which to elect to abandon upon the 7th of February, therefore he was called upon to elect to abandon on that day, and if he did not elect to abandon till the 23rd, still more if he did not elect to abandon till a later day, then that election to abandon was too late, and if the election to abandon only took place after the sale, then it follows that the sale was a determination of their election as against the idea of the loss being treated as a constructive total loss.

For these reasons it appears to me that the onus of proof being upon the plaintiff, he failed to give any evidence to shew that he elected to abandon, or gave notice to abandon within a reasonable time, and as he gave no evidence to justify Lord Coleridge, C.J., in leaving the matter to the jury to decide, Lord Coleridge's, C.J., judgment was right, and the Court below were wrong in holding that the matter should go down for a new trial.

Judgment reversed.

Solicitors for plaintiff: *Parker & Clarke.*
Solicitors for defendant: *Hollams, Son, & Coward.*

[IN THE COURT OF APPEAL.]

June 18.

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Practice—Court of Appeal, Jurisdiction of—Inferior Court—Mayor's Court —Judicature Act, 1873, *s.* 45.

The Mayor's Court is an inferior Court within s. 45 of the Judicature Act, 1873, and no appeal lies to the Court of Appeal from the decision of a divisional Court on appeal from the Mayor's Court, unless special leave to appeal has been given, under that section.

APPEAL from the judgment of the Common Pleas Division in favour of the plaintiff.

The plaintiff recovered judgment in an action brought in the Mayor's Court with leave given to the defendant to move under s. 10 of 20 & 21 Vict. c. clvii. The defendant obtained a rule accordingly calling upon the plaintiff to shew cause why a nonsuit or verdict for the defendant should not be entered. On the 17th

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of May, on cause being shewn, the Common Pleas Division discharged the rule. The Court gave no special leave to appeal.

Attenborough, for the plaintiff, took a preliminary objection. No appeal will lie. An appeal from the Mayor's Court is an appeal from an inferior Court within the meaning of s. 45 (1) of the Judicature Act, 1873; the determination of such appeal is final, unless special leave to appeal be given by the divisional Court. No leave to appeal has been given in the present case.

Lamaison, for the defendant. The procedure in the Mayor's Court is regulated by the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.). Under s. 10 of that Act, on leave obtained from the judge of the Mayor's Court, a motion for a new trial is made to one of the superior Courts in the same manner as motions of a like nature from the superior Courts themselves. The action is treated in the same way as an action in the superior Court. By s. 46 power is given to the Queen in Council by an Order to direct that the provisions of any Act for the amendment of the law and rules framed in pursuance thereof should apply to the Mayor's Court; and by an order of the 17th of November, 1863, s. 34 of the Common Law Procedure Act, 1854, was made part of the Mayor's Court of London Procedure Act, 1857. By virtue of s. 34 of the Act of 1854 the party decided against had a right of appeal to the Exchequer Chamber; and no leave to appeal was necessary. The Court of Exchequer Chamber being done away with, the appeal is to this Court, and no leave is now necessary. Under s. 4 of 20 & 21 Vict. c. clvii. in cases of error on the record the appeal would have been formerly to the Exchequer Chamber (2), but now it is direct to this Court, under s. 18 of the Judicature Act, 1873: *Le Blanch* v. *Reuter's Telegram Co.* (3) If the law were other-

(1) By s. 45 of the Judicature Act, 1873, all "appeals from petty or quarter sessions, from a county court, or from any other inferior Court which might before the passing of this Act have been brought to any Court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by divisional Courts of the High Court . . . . the determination of such appeals shall be final unless special leave to appeal shall be given."

(2) As to the former mode of bringing error from the Mayor's Court, see *Simpson* v. *Henning*, Law Rep. 10 Q. B. 406, n. (1).

(3) 1 Ex. D. 408.

wise, as the Judicature Acts are not made part of 20 & 21 Vict. c. clvii., the appeal would be taken away without any Order in Council. The old right of appeal is not taken away by s. 45 of the Judicature Act, 1873; that section has no application to the present case. The right of appeal existed before, and exists now, for actions in the Mayor's Court were treated as actions in the superior Court, and the appeal is not final.

Attenborough was not called on to reply.

BRAMWELL, L.J. I am of opinion that this objection must prevail. The words of s. 45 of the Judicature Act, 1873, are all appeals from petty or quarter sessions from a county court, or any other inferior Court, shall be heard and determined by divisional Courts. The Mayor's Court is an inferior Court. If the case is not comprehended in the words of this section, I do not know what meaning to give to the words "inferior Court." I do not see to what this section can apply unless it is to Courts such as the Mayor's Court.

BAGGALLAY, L.J. I am of the same opinion. The question is whether an appeal will lie in this case to the Court of Appeal. I think that there is no appeal. The argument of the defendant's counsel is not well founded. The appeal from the Mayor's Court is to a divisional Court under s. 45, and it is impossible to get over the words at the end of that section: the determination of the divisional Court is final unless special leave to appeal is given. Here there is no such leave, and the defendant cannot succeed.

THESIGER, L.J. In the case of the *Mayor of London* v. *Cox* (1), it was decided that the Mayor's Court in London is an inferior Court. Before the passing of the Judicature Acts the appeal from the Mayor's Court, when there was error on the record, was to the Court of Exchequer Chamber: in other cases was to either the Courts of Queen's Bench, Common Pleas, or Exchequer. Then by s. 16 of the Judicature Act, 1873, the jurisdiction which was vested in or exercised by these latter Courts was transferred and vested in the High Court of Justice. Therefore, taking that section alone, the appeal from the Lord Mayor's Court was

(1) Law Rep. 2 H. L. 239.

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transferred to the High Court of Justice; then s. 22 says that the several jurisdictions which are transferred to and vested in the High Court of Justice and the Court of Appeal shall cease to be exercised except by the High Court of Justice and the Court of Appeal respectively, as provided by this Act; therefore we have to see what provision is made as to appeals; in order to ascertain this we must turn to s. 45, and there we find words amply wide to include appeals from the Mayor's Court. All appeals from inferior Courts are to be to the High Court, and there can be no further appeal unless special leave be given. The case comes within the words of s. 45.

Appeal dismissed.

Solicitor for plaintiff: *Attenborough.*
Solicitors for defendant: *Charley, Crawford, & Chester.*

June 3.

[IN THE COURT OF APPEAL.]

CHARLES *v.* TAYLOR, WALKER, & CO.

Master and Servant—Common Employment—Concealed Danger.

The defendants were brewers, having upon the river T, a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants, at the rate of 1*s.* 9*d.* for every ton of coals discharged; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants', who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved:—

Held, that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant, by whose negligence the injury happened, and there was no concealed danger.

ACTION to recover damages for bodily injury caused by the negligence of the defendants' servant.

The cause came on for trial during the Hilary Sittings (Feb. 27), 1878, in Middlesex, when it appeared that the defendants were

brewers, carrying on business at Limehouse, and that their brewery adjoined the river Thames; for the purposes of their business they used coals brought in barges to a wharf belonging to them. The plaintiff was one of a gang of "lumpers," that is, of men who undertook to unload the barges upon being paid by the "lump," that is, as for piecework; the rate of payment was 1*s.* 9*d.* per ton; the money due to the gang was paid by the defendants to one of the gang, who afterwards distributed it amongst them. Upon the day of the accident, whereby the plaintiff was injured, he had been hired as a "lumper" by a labourer in the employ of the defendants, named Ansell, to unload a barge of coals at the defendants' wharf. At the moment of the accident, the plaintiff was carrying a sack of coal upon his back on to the wharf up the stairs covered by the flap which fell upon him. The remaining facts of the case are sufficiently stated in the judgment of Lopes, J., hereafter set out. The defendants consented that the damages should be assessed against them at 150*l.* if the action should be in law maintainable.

Kemp, Q.C., and *Williams*, for the plaintiff.
Day, Q.C., and *E. Baggallay*, for the defendants.

March 6. Judgment was delivered by

LOPES, J. This was an action brought to recover compensation on account of the defendants' negligence. It appeared that the plaintiff on the 19th of February, 1876, was employed in discharging at the defendants' wharf some coals to be used in their brewery, and whilst he was so engaged, a servant of the defendants, who was moving the defendants' barrels, let a barrel slip from a pulley, which came across a flap, broke the chain supporting the flap, and caused the flap to strike the plaintiff, whereby he was seriously injured. The plaintiff had frequently before been at the same spot when the barrels were being moved. It appeared that the plaintiff had been hired to discharge the coals by a labourer called Ansell, in the defendants' employ; the defendants, however, paid the plaintiff, and the defendants only could dismiss him. The defendants consented to a verdict for 150*l.* Judgment was reserved, and it was agreed that I might draw inferences of fact.

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The only question is, whether the nature of the plaintiff's employment was such as to make him and the servant, by whose negligence he suffered, servants in a common employment within a rule, which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

It was argued on the part of the plaintiff, that he was in the employment of Ansell and not of the defendants. In support of this contention, *Abraham* v. *Reynolds* (1) was relied upon. The present case is very distinguishable; the plaintiff in that case was the servant of the carrier and not of the defendants. This case is more like *Wiggett* v. *Fox* (2), where the defendants, having contracted for the erection of the Crystal Palace, entered into agreements with five other persons for the erection of portions of the work, and the sub-contractors engaged the services of the deceased Wiggett. But it was proved that the deceased was paid by the defendants, and the defendants had power to dismiss him though engaged by the contractor; it was held that the plaintiff was the servant of the defendants. The present case is a much stronger case, for there is no pretence for saying that Ansell was a contractor. It is clear that the plaintiff was in the employ of the defendants, and not of Ansell.

With regard to the question of common employment I am unable to distinguish this case from *Morgan* v. *Vale of Neath Ry. Co.* (3). I think that the plaintiff in accepting an employment to work at the wharf, where the barrels were being moved, where he had often in similar circumstances worked before, accepted an employment which of necessity must have exposed him to risk from the carelessness of those moving the casks in the vicinity of the flap, and that he must be considered as between himself and his employers to have taken upon himself that risk.

There will therefore be judgment for the defendants.

The plaintiff appealed.

June 3. *Bucknill*, for the plaintiff, contended first, that the plaintiff at the time of receiving the injury was not servant to the defendants, and as to this cited *Wiggett* v. *Fox* (2); *Murray*

(1) 5 H. & N. 143. (2) 11 Ex. 832; 25 L. J. (Ex.) 188.
(3) Law Rep. 1 Q. B. 149.

v. *Currie* (1); *Rourke* v. *White Moss Colliery Co.* (2); *Swainson* v. *North Eastern Ry. Co.* (3); secondly, that the plaintiff was not a fellow-servant to, and was not engaged in a common employment with, the defendants' servant, by whose negligence the injury happened, and as to this, he cited *Bartonshill Coal Co.* v. *McGuire* (4); *Morgan* v. *Vale of Neath Ry. Co.* (5); *Wilson* v. *Merry* (6); *Smith* v. *Steele* (7); *Lovell* v. *Howell* (8); *Woodley* v. *Metropolitan District Ry. Co.* (9); thirdly, that the danger to which the plaintiff was exposed was concealed, for he could not be supposed to have contemplated, at the time of entering upon the employment, the accident which actually happened.

Day, Q.C., and *Erskine Pollock*, for the defendants, cited *Abraham* v. *Reynolds.* (10)

BRETT, L.J. The plaintiff's counsel has argued this case with great ability, nevertheless we must uphold the judgment of Lopes, J.

As to the first point, whether the plaintiff was servant to the defendants, I wish to remark, that by agreement of the parties the facts were left to Lopes, J., in order that he, acting as a jury, might find what they were. It is not for us to consider whether we should have found as he did, but whether his finding is so far wrong that we ought to set it aside; and I think that we ought not to dissent from it. Ansell swore that he was a "lumper" working at the wharves along the river side, and that the terms agreed upon between himself and the defendants were that he should get the barge discharged and should be paid at the rate of 1*s.* 9*d.* for every ton that was unloaded, he managing everything necessary to perform that laborious employment. He selected, as he liked, the men who were to work under him; but they were to work as if he were foreman: such was the nature of the employment, that he could not dismiss any workman without reference to the defendants. Lopes, J., was justified in saying that Ansell

(1) Law Rep. 6 C. P. 24.
(2) 2 C. P. D. 205.
(3) 3 Ex. D. 341.
(4) 3 Macq. 300.
(5) Law Rep. 1 Q. B. 149.
(6) Law Rep. 1 Sc. Ap. 326.
(7) Law Rep. 10 Q. B. 125.
(8) 1 C. P. D. 161.
(9) 2 Ex. D. 384.
(10) 5 H. & N. 143.

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was not a contractor, but a servant to the defendants; he was paid not as master-workman, but as foreman. I think Lopes, J., right as to the nature of Ansell's employment as "lumper," and it follows that the plaintiff was servant to the defendants; the case before us is one where a servant has been injured by a servant of the same employers.

The second point was, that although the plaintiff might be a servant to the defendants, nevertheless he was not a fellow-servant with the man by whose negligence the accident happened. Many cases have been cited to us for the purpose of shewing what is the principle upon which, if a servant is guilty of negligence causing bodily harm, his master is held liable to a stranger, but not to a servant engaged in a common undertaking with that other servant. It is not for us sitting as judges to criticise the law; but we must sometimes look out for the principles upon which it is founded. Many views upon the subject before us have been expressed; they are certainly not identical, although they may not be inconsistent with each other. Upon the present occasion it is unnecessary to ascertain the true principle, but in general the master is not liable. I shall now enunciate one principle relating to the question; I do not say there may not be more. It is this: when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other. This is a formula, though not the only one. Let me apply this formula to the facts before us; the service of the plaintiff would compel him to work at the same time and in the same place as the servant engaged in moving the barrels, so that the negligence of the latter in moving the defendants' barrels might injure the plaintiff whilst engaged in unloading the barge; the negligence of the one in his work might cause injury to the other whilst employed in his work. I think that Lopes, J., was right in holding that the defendants, who were the employers of both the plaintiff and the servant who was guilty of negligence, were not liable for the accident; it was not necessary, in order to

exempt the defendants, that the two servants should be engaged in the same kind of work.

I think that this is not a case of concealed danger.

COTTON, L.J. I also think that the appeal fails.

The first point to be determined is, whether the plaintiff was servant to the defendants; upon this I had felt some hesitation; but we have not to find the facts for the first time. Lopes, J., has found that the plaintiff was the defendants' servant; I have some doubt how I should have found this question: but the witnesses are not before us, and we cannot judge as to their accuracy and credibility, and therefore I think that we ought not to interfere with the finding. We must start with the case upon the footing that the plaintiff was in the defendants' service.

As to the second point, whether there was a common employment, I wish to remark that although there may be cases where the distinction between what is and what is not a common employment may be hard to determine, it is unnecessary to consider the question now. In the case before us the plaintiff was employed in the business of the brewery, and it must be taken that the defendants as masters pointed out that they would engage other servants, whose acts as between them and the plaintiff were not to be considered as the defendants'. The plaintiff knew that other persons would be employed in carrying on the business of the brewery; barrels are used for the purposes of brewing, and the servant, by whose negligence the injury was inflicted, was at the time of the accident engaged in the work of the brewery. According to the authorities, in order to exempt the master from liability, it is unnecessary that the employment should be of the same nature, if there is a common object, and if it must be taken that for the purpose of effecting that object the master must employ other servants. I think, therefore, that the plaintiff and the servant who caused the misfortune were engaged in a common employment.

A third point has been argued, namely, that the defendants are not protected from the liability because danger is not apparent. If in order to exempt them it were necessary to hold that the danger must be foreseen by the servant, upon the evidence I should be inclined to come to the conclusion that the plaintiff did

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foresee it; at all events if he did not contemplate the accident which actually happened, he might have foreseen it: it would therefore be a risk which he took upon himself. But the decisive answer to this point is, that according to English law, where a servant goes into a service in which he knows that other servants will be employed, he must be assumed to have undertaken that he will not consider the acts of his fellow-servants as the acts of his master. Whether this principle is good or bad, it can be abolished only by the power of the legislature; we must adhere to what has been laid down in former decisions.

THESIGER, L.J. In my opinion the judgment of Lopes, J., must be affirmed. It seems to me to be a question of fact whether the plaintiff was servant to the defendants: if that had been answered in the negative, I should have thought this action maintainable; but the evidence produced upon behalf of the plaintiff was insufficient to entitle him to succeed. According to the statements of Ansell, he himself was a servant to the defendants, if not permanently, at least upon the occasions when he was employed by them. The labourers employed by him were paid not by him, but by the defendants in a lump sum, and he could not discharge them without referring to the defendants. Certainly I cannot say that Lopes, J., drew a wrong conclusion. It has been urged that an employment is "common" within the meaning of the rule exempting employers only when the immediate object of the work in which the servants are engaged is the same; but I think that this argument is answered by the principles laid down in *Morgan* v. *Vale of Neath Ry. Co.* (1), and it follows from this case that where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured by the negligence of another servant whilst engaged in furthering the same object. The facts in that case are not in principle to be distinguished from those in the case before us. The plaintiff and the man by whose negligence he was injured were engaged in a common object, namely, the carrying on of the business of a brewery; and it does not matter that they were not engaged in the same kind of work. I do not think it material to ascertain whether in point

(1) Law Rep. 1 Q. B. 149.

of fact the plaintiff was aware that the flap might fall upon him; according to the rule of law it was a risk which he must be taken to have contemplated.

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Judgment affirmed.

Solicitor for plaintiff: *H. A. Lovett.*

Solicitors for defendants: *Gellatly, Son, & Warton.*

JOHNSON AND OTHERS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY AND THE WIGAN WAGGON COMPANY, LIMITED.

March 2; *July* 3.

Conversion—Vendor and Purchaser—Delivery of Goods to Order of Third Party assenting to pay—Resumption of Possession by Vendor—Conversion —Measure of Damages.

The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed the defendant waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented and were authorized by L. to pay them. Some waggons were delivered by the waggon company to the defendant railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies for conversion:—

Held (1.) That, the property in the goods and the right to possession of them having passed to the plaintiffs, both defendants were liable:

(2.) That the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price.

FURTHER CONSIDERATION.

Statement of Claim. 1. Between the months of July and October, 1876, the plaintiffs deposited with the defendants at the Ratcliffe Bridge railway station thirty-eight tip-waggons, the property of the plaintiffs, and the defendants received the waggons to hold them to the order of the plaintiffs.

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2. In October, 1876, the plaintiffs demanded of the defendants delivery of the waggons, but the defendants detained the same and refused to deliver the same to the plaintiffs or to their order. Claim, 817*l.* damages.

By the particulars the plaintiffs claimed 21*l.* 10*s.* per waggon as the value.

Judgment having been signed for want of a statement of defence, a judge at chambers, on the 28th of July, 1877, made an order that the judgment and all subsequent proceedings should be set aside, the statement of claim should be delivered to the Wigan Waggon Company, and they should be at liberty to appear and defend the action.

A statement of defence was on the 4th of August delivered on behalf of the Lancashire and Yorkshire Railway Company, denying that they received the waggons to hold to the order of the plaintiffs, and alleging that the waggons were despatched to the station for delivery to the plaintiffs' order by the Wigan Waggon Company, but that the plaintiffs and one Waller, to whom by the plaintiffs' order the defendants tendered the waggons, refused to accept them, and they were returned to the defendants and lay an unreasonable time at their station obstructing the railway, and were also claimed by the Wigan Waggon Company, to whom the defendants re-delivered them, and who were prepared to dispute the plaintiffs' claim.

The Wigan Waggon Company, by their statement of defence, in addition to a denial of the allegations in the statement of claim, alleged that, in May, 1876, they entered into an agreement with Lockwood & Co. to supply them with 100 tip-waggons according to an agreed sample, payment to be made on the 20th of the March following the completion of the agreement; that, before the completion of the agreement, it was agreed between Lockwood & Co., the Wigan Waggon Company, and the plaintiffs, that the plaintiffs should be substituted for Lockwood & Co. in the agreement; that delivery of the waggons should be made by the Wigan Waggon Company to the plaintiffs, and that payment as per agreement, with 1*l.* per waggon additional (to be handed over to Lockwood & Co.), should be made by the plaintiffs to the Wigan Waggon Company; that the Wigan Waggon Company

completed the agreement, and were ready and willing to deliver the 100 waggons, and in fact delivered the thirty-eight mentioned in the statement of claim to the Lancashire and Yorkshire Railway Company for delivery to the plaintiffs; that the Lancashire and Yorkshire Railway Company tendered the thirty-eight waggons to the plaintiffs or order, but the plaintiffs and their agents refused to accept the waggons from the railway company, upon the ground that they were not equal to sample, and returned the thirty-eight waggons to the defendants the Wigan Waggon Company through the railway company; and, by way of counter-claim, they claimed damages against the plaintiffs for non-acceptance of the 100 waggons.

The plaintiffs in their reply joined issue as against the Lancashire and Yorkshire Railway Company; and, as against the Wigan Waggon Company, they denied that it ever was agreed that the plaintiffs should be substituted for Lockwood & Co. in the agreement of May, 1876, and alleged that an agreement was made by the plaintiffs and Lockwood & Co., whereby Lockwood & Co. agreed to sell and the plaintiffs to buy waggons according to a certain sample waggon; that it was afterwards understood by the plaintiffs that the waggons were to be made for and sold to Lockwood & Co. by the defendants; that it was subsequently arranged between the Wigan Waggon Company and the plaintiffs that, after delivery, the plaintiffs would, on account of Lockwood & Co., and on receiving their authority, pay the defendants the price Lockwood & Co. had agreed to pay them for the waggons; but that this arrangement was purely for the convenience of Lockwood & Co. and the Wigan Waggon Company; and the plaintiffs never made themselves responsible to the Wigan Waggon Company for the price, but that it was expressly agreed that the relation between the parties should not be altered; that Lockwood & Co., by the Wigan Waggon Company, did deliver to the plaintiffs the thirty-eight waggons, and the same were received by the Lancashire and Yorkshire Railway Company, to hold to their order until the breach in the statement of claim alleged; that the waggons were not according to contract, and the plaintiffs, who had resold the waggons, had a claim against Lockwood & Co.'s estate for their breach of contract in respect of these

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waggons and other waggons not the subject of this action. Issue thereon.

The cause was tried before Denman, J., at the Yorkshire Assizes. The facts proved at the trial, and the arguments urged on a motion for judgment, are fully set forth in the judgment.

Feb. 16. *C. Russell, Q.C.*, appeared for the plaintiffs; *Edwards, Q.C.*, for the Wigan Waggon Company; and *Crompton*, for the Lancashire and Yorkshire Railway Company.

Cur. adv. vult.

March 2. DENMAN, J., after stating the nature of the action, said: At the trial it appeared that, on the 11th of May, 1876, the plaintiffs had employed the Messrs. Lockwood to manufacture for them 100 tip-waggons at 18*l.* each, according to a sample waggon agreed upon. The plaintiffs had themselves contracted with one Waller to supply him with a similar number of similar waggons at 21*l.* 10*s.* each, which for thirty-eight waggons would make a profit of 133*l.* On the 10th of May Lockwoods employed the Wigan Waggon Company to manufacture the 100 waggons required by the plaintiffs at 17*l.* per waggon; and the Wigan Waggon Company on the 24th proposed to charge the plaintiffs for the waggons direct, to which proposal the plaintiffs on the 25th assented upon receiving Lockwoods' authority so to pay. In June, the plaintiffs, being pressed by Waller for the waggons, pressed both Lockwoods and the waggon company for expedition in delivery; and on the 26th of June some waggons were delivered to one of the stations of the Lancashire and Yorkshire Railway Company, to the order of the plaintiffs, but not to the station named in the contract between the plaintiffs and Lockwoods. The plaintiffs on the 26th of June wrote to the waggon company stating that their customers complained that the first lot were not according to sample. The thirty-eight waggons, the subject of the action, were on the 22nd of July lying to the order of the plaintiffs at the Ratcliffe station of the Lancashire and Yorkshire Railway. On that date the plaintiffs wrote to the waggon company as follows:—"As you are interested in the 100 waggons supplied by you to Mr. Lockwood, and by him to us, we inclose copy of a letter written by us to-day to him, which will

shew you the position we are advised to take up." Then followed a copy of the plaintiff's letter to Messrs. Lockwood intimating that, as the waggons were not according to sample, and *were rejected by their buyers, they would dispose of the waggons at the best price obtainable*, and hold Lockwoods responsible. Lockwoods also on the 24th wrote to the waggon company informing them that, as the waggons were not according to sample, they must decline to have anything further to do with them, and hold them responsible for any loss.

The jury found that Lockwoods had rejected the waggons; and it was contended that, this being so, the plaintiffs could not recover, as they could have no property in the goods which had been rejected by their vendors, who had not been paid. But, in answer to this, it was proved as against the Lancashire and Yorkshire Railway Company that they throughout held the goods to the order of the plaintiffs, and that, after notice from the plaintiffs not to deliver to any one without their order, they (the Lancashire and Yorkshire Railway Company) delivered the goods to the waggon company.

So far as the Lancashire and Yorkshire Railway Company are concerned, it therefore is clear that there is no defence to the action. As regards the waggon company, I think they are also liable; for, although I am of opinion that Lockwoods were still the parties liable, upon their contract with the plaintiffs, notwithstanding the arrangement that the payments were to be made to the waggon company direct, I think that the waggon company had no control over the goods after they were once delivered to the railway company to the order of the plaintiffs. As against the waggon company, the property in the goods had passed to the plaintiffs, and they could not, I think, take advantage of a repudiation by Lockwoods, the plaintiffs being then in possession of the goods through the railway company, and claiming the property in the goods. The mere fact that they were at the same time insisting on their rights as against Lockwoods by reason of the goods not being according to sample would not alter or impair their property in the goods. I think therefore that the plaintiffs are entitled to recover as against both defendants.

As to damages,—I think the action is substantially an action

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of trover, and that the plaintiffs are not entitled to the full value of the goods, inasmuch as but for the concession they would have been bound to pay 18*l.* per waggon to Lockwoods within a short period of the time when the conversion took place: but, unless they had been deprived of the waggons, I see no reason to think that they might not have made the profit of 3*l.* 10*s.* on each waggon which they would have made if no difficulties had occurred. This would for the thirty-eight waggons give a profit of 133*l.*, which I am inclined to think is the amount for which the judgment ought to be given: but, inasmuch as the question of damages was hardly discussed, I think it better to reserve final judgment (unless both parties agree to a judgment for 133*l.*) until both parties have had an opportunity of considering whether they desire a further discussion of the point. If neither party elects to apply for such further consideration of the matter within a week, the judgment to stand for that amount.

The plaintiffs not being satisfied with the amount of damages awarded, the case was again argued.

June 22. *C. Russell, Q.C.*, and *R. Henn Collins*, for the plaintiffs. The measure of damages in trover generally is the value of the goods at the time of the conversion: see *Mulliner* v. *Florence.* (1) Where a contract or relationship exists between the plaintiff and the defendant the measure of damages is, no doubt, sometimes different, as, for example, where the buyer of goods who has not paid the price sues the vendor, who has a lien, for converting them, in which case the measure of damages is the value of the goods less the unpaid price. But the distinction between cases where such relationship exists and those of conversion by a mere stranger or wrongdoer is recognised throughout the authorities which may be cited for the defendant: see *Chinery* v. *Viall* (2); *Turner* v. *Hardcastle.* (3) *Johnson* v. *Stear* (4), and the principle on which it is based, is well expressed in *Donald* v. *Suckling* (5), by Shee, J., viz., "that between the parties to a contract the measure

(1) 3 Q. B. D. 484, at p. 490.

(2) 5 H. & N. 288, per Bramwell, B., at p. 295; 29 L.J. (Ex.) 180, at p. 184.

(3) 11 C. B. (N.S.) 683, at p. 708; 31 L. J. (C.P.) 193, at p. 198.

(4) 15 C. B. (N.S.) 330, at p. 337; 33 L. J. (C.P.) 130, at p. 133.

(5) Law Rep. 1 Q. B. 585, at p. 601.

of damages for a breach of the contract must be the same, whether the form of action be ex contractu or ex delicto, and that in such a case general rules applicable to the latter form, the only one competent for the redress of injuries purely tortious, are not to be strained to the doing of manifest injustice." The plaintiffs here had a right to immediate possession of the goods, and would be liable to Lockwood, their vendor, for the full value, and are entitled to recover it from the defendants, who are mere strangers and wrongdoers: *Edmundson* v. *Nuttall.* (1)

C. Crompton appeared for the Railway Company, defendants.

J. Edwards, Q.C., and *Myburgh*, for the Waggon Company, defendants. The Waggon Company are not mere strangers and wrongdoers. They had agreed with the plaintiffs to receive direct payment from them for the waggons supplied. The price charged and the value of the goods at the time of the conversion are identical, and as, if the plaintiffs kept the waggons, they must have paid the price, the damages actually sustained are nil, or nominal only: *Johnson* v. *Stear* (2); *Donald* v. *Suckling* (3); *Halliday* v. *Holgate* (4); *Brierly* v. *Kendall* (5), and see that case mentioned by Pollock, C.B., in *Toms* v. *Wilson* (6); *Chinery* v. *Viall* (7); Mayne on Damages (3rd ed.), 352. The plaintiffs are not liable to their original vendors who have made default. No judgment for nominal damages in this action will affect the plaintiffs' right to sue Lockwoods, or to set up a counter-claim if sued.

R. Henn Collins replied. The defendants seem to raise the question of novation which they abandoned at the trial.

[DENMAN, J. The correspondence shews that the parties did not rely on any novation.]

And there was none in fact. The plaintiffs were under no binding contract to pay the company, and payment to them would not have discharged the liability of the plaintiffs towards Lockwoods.

Cur. adv. vult.

(1) 17 C. B. (N.S.) 280; 34 L. J. (C.P.) 102.
(2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(3) Law Rep. 1 Q. B. 585.
(4) Law Rep. 3 Ex. 299.
(5) 17 Q. B. 937; 21 L. J. (Q.B.) 161.
(6) 4 B. & S. 442, at p. 458; 32 L. J. (Q.B.) 382.
(7) 5 H. & N. 288; 29 L. J. (Ex.) 180.

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July 3. DENMAN, J., delivered final judgment. After recapitulating the facts, his Lordship said: The jury found that the value of the waggons at the time of the detention was 17*l.* each, i.e., 646*l.* The plaintiffs contended that they were entitled to recover the full value of the waggons; the defendants, that nominal damages only could be recovered. I suggested on the former occasion that the plaintiffs were entitled to the 133*l.* above mentioned. The parties, however, at my suggestion, desiring a further discussion upon it, the question of damages was elaborately argued in support of the two extreme contentions above mentioned, and many cases were quoted on both sides.

I am now of opinion that the measure of damages suggested by me was wrong, and that the plaintiffs are entitled to recover the value of the waggons at the time of the conversion, i.e. 646*l.* It is laid down in all the text-books and authorities that, where goods are unlawfully converted, the proper measure of damages is primâ facie the full value of the goods. Thus, in *Keen* v. *Priest* (1), where the landlord, having a right to distrain upon other goods, seized sheep which were privileged on the ground that there were other goods on the premises, it was held that the full value of the sheep were recoverable, though the rent was due and other goods might have been taken. So, in *Gillard* v. *Brittan* (2), where the seller of goods not paid for according to contract retook them from the buyer, even under circumstances inducing suspicion of fraud, it was held that the buyer was entitled to recover the full value of the goods. So, where a mortgagee of chattels, being an unpaid vendor, resumed possession in a manner not authorized by the deed, it was held that the vendee's and mortgagor's assigns were entitled to recover the full value of the goods: *Turner* v. *Hardcastle.* (3) So, in *Edmundson* v. *Nuttall* (4), the plaintiff was held entitled to recover the full value of looms seized in execution, when if they had been seized one day later they would have been lawfully seized in execution for a debt due from the plaintiff to the defendant. In that case Byles, J., lays it down (5), that

(1) 4 H. & N. 236; 28 L. J. (Ex.) 157.

(2) 8 M. & W. 575; 11 L. J. (Ex.) 133.

(3) 11 C. B. (N.S.) 683; 31 L. J. (C.P.) 193.

(4) 17 C. B. (N.S.) 280; 34 L. J. (C.P.) 102.

(5) 17 C. B. (N.S.) at p. 297.

"he who wrongfully converts goods of another is primâ facie liable in damages to the full value of the goods converted; and it is no answer to say that the wrongful act of the defendant has operated to relieve the plaintiff from a debt." *Swire* v. *Leach* (1) is to the same effect.

It is, however, laid down in several cases that there is no absolute law to the effect that in all cases the value of the goods ought to be recovered, but that the true measure of damage is the real damage sustained by the unlawful act of the defendant; and the defendants' counsel cited several cases in support of this proposition. The earliest of these was *Brierly* v. *Kendall* (2), decided in 1852. It differed only from *Turner* v. *Hardcastle* (3), mentioned above, in being an action against the mortgagee, instead of against a third party. But it was held that, where the mortgagees had entered prematurely before the day appointed for payment, though trespass would lie, the measure of damages should not be the value of the goods, but the value of the plaintiff's interest at the time of the trespass, which the Court, being asked to fix, fixed at a nominal amount, Lord Campbell, in his judgment, saying,—"If the action had been against a third party, the case would have been different." This case was followed in 1860 by *Chinery* v. *Viall.* (4) In that case the plaintiff, having bought some sheep from the defendant on credit, had left them in the custody of the defendant, who, without any default or refusal to pay on the part of the plaintiff, sold the sheep before the plaintiff arrived to take them away; and it was held that, though there was a conversion of the sheep for which the defendant was liable, the measure of damage was not the value of the sheep, but the loss sustained by the plaintiff by not having the sheep delivered to him, which, according to the finding of the jury, was 5*l.* It seems difficult to reconcile this case with that of *Gillard* v. *Brittan* (5), mentioned above, and perhaps it must be taken to have overruled that case; but it was, like *Brierly* v. *Kendall* (2),

(1) 18 C. B. (N.S.) 479; 34 L. J. (C.P.) 150.

(2) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

(3) 11 C. B. (N.S.) 683; 31 L. J. (C.P.) 193.

(4) 5 H. & N. 288; 29 L. J. (Ex.) 180.

(5) 8 M. & W. 575; 11 L. J. (Ex.) 133.

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a case which arose between the immediate parties to a transaction, and not between strangers. So also were the cases of *Toms* v. *Wilson* (1) and *Johnson* v. *Stear* (2), which were relied upon by the defendants.

The questions raised in the present case are, whether any of the cases in which the measure of damages has been held to be other than the value of the goods apply to a case where the defendant is a stranger, and whether the defendants in this case are to be regarded as strangers to the plaintiffs within the meaning of that word used in the cases, or whether any such relation exists as to enable them to rely upon any qualification of the primâ facie rule. In *Chinery* v. *Viall* (3), Bramwell, B., makes the distinction, and suggests the alternative effect, as follows (4): "It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price, and probably in such a case he would, for there the seller would be in no default; and, if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the whole price, and the vendee would be entitled to recover the amount from the stranger."

It was contended by the defendants that, by reason of what had passed between Lockwoods and the plaintiffs, and between the plaintiffs and the defendants, the Wigan Waggon Company, the latter could not be looked upon as strangers, nor could Lockwoods' right to payment be regarded, inasmuch as they had rejected the waggons as not according to sample. I am, however, unable to find any authority for holding that in this case the plaintiffs are not entitled to deal with either of the defendants as mere wrongdoers. The defendants, the railway company, indemnified by the Wigan Waggon Company, hand back to them the waggons which they held to the order of the plaintiffs,

(1) 4 B. & S. 442; 32 L. J. (Q.B.) 382.

(2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(3) 5 H. & N. 288, at p. 295.

(4) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

after informing the Wigan Waggon Company that they could do nothing without the plaintiffs' authority. The defendants, the Wigan Waggon Company, had no relations with the plaintiffs, except that, for their own advantage, they had agreed with Lockwoods that the plaintiffs, with Lockwoods' authority, should *pay* them direct for the waggons, not that they would be *liable* to them in any way, or escape from liability to Lockwoods. It would be impossible for me, upon the evidence before me, to estimate with any certainty the ultimate loss to the plaintiffs by reason of the conversion: nor do I see how any jury could in any action between these parties have inquired into all the circumstances necessary to be ascertained before they could assess the ultimate loss. The case of *Mulliner* v. *Florence* (1), decided in the present year, is an authority for the plaintiffs. There the opinion of Williams, J., in *Johnson* v. *Stear* (2), is cited with approbation,—"The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages." In the present case, as against either of the defendants, I think the plaintiffs could have so held the property.

On the whole, therefore, I am of opinion that the primâ facie rule applies to this case, and that there is nothing to displace it, and that the defendants are liable to pay the value of the waggons at the time of the conversion, which were assessed by the jury at 646*l.*, and I give judgment for that sum and costs.

Judgment accordingly.

Solicitors for plaintiffs: *Van Sandau & Cumming, for J. T. Belk & Parrington, Middlesborough.*

Solicitors for defendants: *Clarke, Woodcock, & Rylands, for T. A. & J. Grundy & Co., Manchester.*

(1) 3 Q. B. D. 484, at p. 491. (2) 15 C. B. (N.S.) 330, at p. 340.

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BUDGE *v.* ANDREWS AND OTHERS.

Municipal Elections Acts, 1872 *and* 1875—*Burgess-Roll—Objection to Nomination-Paper—Jurisdiction of the Court*—5 & 6 *Wm.* 4, *c.* 76, *s.* 22—22 *Vict. c.* 35, *s.* 6—35 & 36 *Vict. c.* 60, *s.* 12—38 & 39 *Vict. c.* 40, *s.* 1, *sub-s.* 2, *and s.* 5.

Every person whose name is on the burgess-roll of a borough published on the 22nd of November in any year, pursuant to s. 22 of 5 & 6 Wm. 4, c. 76, is entitled to be nominated for election as a councillor, and to be elected, at the election which takes place on the 1st of November ensuing; it is not necessary that he should also be on the roll in force at the time the nomination-paper (under 38 & 39 Vict. c. 40, s. 5) is signed.

Quære, whether a burgess on the roll in force at the time of the nomination, but not on the roll upon which the election proceeds, can properly be a nominator?

Where the mayor of a borough has, under s. 1, sub-s. 3, of 38 & 39 Vict. c. 40, improperly allowed an objection to a nomination-paper, the Court has jurisdiction under 35 & 36 Vict. c. 60, s. 12, to entertain a case questioning the validity of the election.

SPECIAL CASE stated pursuant to the Municipal Elections Acts, 1872 and 1875:—

1. The petitioner was a candidate at the election of councillors of the south-east ward of the borough of Poole on the 1st of November, 1877.

2. J. A. T. Buckley and H. T. Trevannion were candidates, and were declared to be duly elected.

3. The borough of Poole is divided into two wards, the north-east ward and the south-east ward.

4. On the 1st of November, 1874, F. T. Rogers was duly elected an alderman for Poole for six years, and then duly complied with all the requirements of the statutes in respect of such election, his qualification, and acceptance of office, and was when so elected duly inrolled and entitled to be inrolled on the burgess-roll of the borough, and, save as hereinafter appears (if at all) to the contrary, acted as such alderman regularly till the 1st of November, 1876, when he acted as ward alderman for the south-east ward of the said borough, having been duly elected to that office.

18. Notices appointing agents and clerks to act for the

petitioner at the election of town councillors for the south-east ward, to be holden on the 1st of November, 1877, and addressed to Rogers as such ward alderman for the ward, were sent by the petitioner to the town-clerk prior to the election.

19. On certain days between the 1st and 15th days of October, 1877, Mr. Balston, the then mayor, and two assessors duly appointed, held courts for the purpose of revising the burgess-lists. At such courts certain objections were urged against voters whose names appeared on the lists being then revised; the following being a list of the voters in the south-east ward to whom objections were so urged, viz. J. Burt, J. Cobb, G. Flander, G. Greenhill, I. Howard, D. Lewin, W. Lock, — Medway (widow), J. Musselwhite, T. Marsh, E. S. M. Pearce, C. Randall, A. Rogers, I. S. Robbins, J. Sims, C. R. Sherring, W. Stickland, I. Toop, and G. Wanhill.

20. The only proof of notice of such objections having been given to the persons objected to as aforesaid was as follows:—

21. Stamped duplicates of such notices, similar to the stamped duplicates mentioned in 6 Vict. c. 18, s. 100, were tendered in evidence on behalf of the persons objecting; but no other evidence was offered to prove either the posting of the originals or their delivery.

22. On behalf of the persons so objected to, it was objected that there was no lawful proof of service of the notices of objections.

The mayor, after adjourning for the purpose of considering the objection, decided that sufficient proof of service had been given, and decided that the persons objected to were not qualified to be on the burgess-list, and that the objections to them were good; and the names of the persons so objected to were thereupon struck off the said burgess-list.

23. No application has been made by any of the persons whose names were so struck off the burgess-list, under the provisions of s. 24 of 7 Wm. 4 & 1 Vict. c. 78.

24. On the 22nd of October, 1877, the new burgess-roll and ward-lists of the borough and ward were duly published.

25. On the 23rd of October, 1877, six candidates were nominated in writing for the south-east ward. The names of the six candidates were,—James Andrews, Titus Buckley, Henry Thomas

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Trevannion, Henry Farmer, Philip Edward Lionel Budge, and *George Frederick Wanhill.* All the candidates were nominated in writing, and by separate nomination-papers.

26. Among the burgesses subscribing the nomination-papers of Andrews, Buckley, and Trevannion was the said Alfred Balston, who at the time of signing the nomination-papers was an inrolled burgess of the borough, and who at the time of the election in question was holding, as hereinbefore appears, the office of mayor in the borough.

27. Copies of the nomination-papers hereinafter mentioned, marked B., C., and D., were appended to the case.

28. The said Farmer and Budge were persons inrolled on the burgess-roll and south-east ward list of the borough and ward, and were in all other respects qualified to be elected councillors. Wanhill was not inrolled on the burgess-roll and ward-list published on the 22nd of October, 1876, but he was inrolled as "George F. Wanhill" in the burgess-roll for the borough published on the 22nd of October, 1877, and was in all other respects qualified to be elected a councillor. A copy of the nomination-paper of Wanhill was appended, marked E.

29. Wanhill, though in all respects so entitled, was by an omission of the overseer of the poor of the tything of Longfleet in the said borough of Poole, not inrolled in the burgess-roll published on the 22nd of October, 1876.

30. No application has been made by Wanhill, under the provisions of s. 24 of 7 Wm. 4 & 1 Vict. c. 78, to have his name inserted on such burgess-roll.

31. On the 24th of October, 1877, the mayor attended alone, without any alderman or assessor, at the Town Hall, to decide on the validity of certain objections made to the nomination-papers of all the candidates.

32. Objections were duly made to the nomination-papers of Andrews, Buckley, and Trevannion, on the ground that the mayor, being the proper officer to decide on the validity of nomination-papers, was not qualified himself to subscribe their nomination-papers: but the mayor disallowed the objection.

33. An objection was made by Trevannion, under the Municipal Elections Act, 1875, s. 1, sub-s. 3, to the nomination-paper of

Wanhill, on the ground that his name was not on the burgess-roll published on the 22nd of October, 1876.

34. The mayor by a decision in writing allowed such objection.

35. A poll was held in the said ward on the 1st of November, 1877, the result of which was as follows,—Andrews, 476 votes; Buckley, 458 votes; Trevannion, 452 votes; Farmer, 452 votes; Budge, 447 votes. There being only three vacancies in the body of councillors, Rogers, who presided at the election, gave a casting vote in favour of Trevannion.

36. On the 1st of November, 1877, Rogers declared Andrews, Buckley, and Trevannion duly elected, and published a list of their names as and for a list of the names of the persons so elected.

The questions for the opinion of the Court were:—1. Whether Andrews, Buckley, and Trevannion were, or any of them was, duly elected to the office of councillor; 2. Whether, if they or one of them were not duly elected, their or his election is void; 3. Whether the nominations of Andrews, Buckley, and Trevannion were illegal and void, or not; 4. Whether the decision of the mayor allowing the objection to the nomination-paper of Wanhill was wrong, or not; 5. Whether the petitioner was entitled to any and what relief.

The respondents object to questions 3 and 4 being determined by the Court, on the ground that the Court has no jurisdiction to determine the same.

Sir H. S. Giffard, S.G. (*Grantham, Q.C.*, with him), for the petitioner. The disallowance by the mayor of the nomination-paper of Wanhill was clearly wrong, and renders the election of the three successful candidates void. Being on the burgess-roll published on the 22nd of October, 1877, Wanhill was entitled to be nominated for the election which was to take place on the 1st of November: it was not necessary that he should also be on the roll for the preceding year: 5 & 6 Wm. 4, c. 76, ss. 22, 30; 38 & 39 Vict. c. 40, s. 1, sub-s. 2, and s. 5. And this is a matter which the Court has jurisdiction to entertain under s. 12 of 35 & 36 Vict. c. 60. (1)

(1) The rest of the argument turned upon points upon which the Court pronounced no decision.

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May 10. *Pollard* (*Benjamin, Q.C.*, with him), for the respondents, was desired by the Court to confine his argument to the third and fourth questions. To entitle a party to nominate or to be nominated, he must be on the roll existing and in force at the time the nomination-paper is signed and also on the roll in force at the time of the election: *Reg.* v. *Harvey* (1); *Reg.* v. *Dixon* (2); *Whalley* v. *Bramwell* (3); *Ex parte Hindmarch.* (4) The propriety of the mayor's decision disallowing a nomination-paper is not a matter which this Court can entertain, s. 12 of 35 & 36 Vict. c. 60 limiting its jurisdiction to questions of bribery or undue practices, disqualification of a candidate, or undue election. The election is only to be questioned in this Court in respect of matters which cannot be dealt with by any existing jurisdiction.

GROVE, J. This was a petition under the Municipal Elections Act, 1872, and 1875, against four persons, viz. Andrews, Buckley, Trevannion, and Rogers, the three first named having been elected town-councillors for the south-east ward of the borough of Poole, at the election which took place on the 1st of November, 1877, and the fourth being the returning officer of that borough. By the special case several objections were taken to the validity of the election. One of them appearing to us to be of great force, and going to the foundation of the proceedings, we desired the learned counsel for the respondents to confine himself to that: and, notwithstanding the very able argument of Mr. Pollard, who is well acquainted with the subject, and who has referred us to all the various statutory provisions bearing upon it, we have come to the conclusion that the objection is a fatal one. The objection which we hold to be fatal is that comprised in the fourth question submitted to us, viz. whether the decision of the mayor allowing the objection to the nomination-paper of Wanhill was wrong or not. To this was added a further objection, viz. that the Court has no jurisdiction to entertain or determine that question. We consider it more convenient to take the question itself first, and to deal with the point of jurisdiction afterwards.

The facts as to Wanhill are as follows:—On the 23rd of October,

(1) 3 Q. B. 475.
(2) 15 Q. B. 33.
(3) 15 Q. B. 775.
(4) Law Rep. 3 Q. B. 12.

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1877, six candidates (among whom was Wanhill) were nominated in writing for the south-east ward. Wanhill, whose Christian names were George Frederick, was not inrolled on the burgess-roll and ward-list published on the 22nd of October, 1876; but he was inrolled as "George F. Wanhill" in the burgess-roll for the borough published on the 22nd of October, 1877, and was in all other respects qualified to be elected a councillor. By an omission of the overseer of the tything of Longfleet, he was not inrolled in the burgess-roll published on the 22nd of October, 1876; and no application had been made by him, under the provisions of s. 24 of 7 Wm. 4 & 1 Vict. c. 78, to have his name inserted on such burgess-roll.

This objection turns upon the question whether it is necessary, in order to make the nomination valid, that the person nominated should be on the burgess-roll published on the 22nd of October, 1876, or on that published on the 22nd of October, 1877, or on both, or that he should be on the burgess-roll published on the 22nd of October, 1876, and entitled to be on the new roll, the roll upon which this election proceeded. On the part of the respondents it was argued that it was necessary that he should be on the old roll and also entitled to be on the burgess-roll published on the 22nd of October, 1877. On the part of the petitioner it was contended that he was entitled to be a candidate, he being on the burgess-roll published on the 22nd of October, 1877, and therefore that the decision of the mayor, who allowed the objection to his nomination-paper, was wrong.

I am of opinion that the mayor was wrong. I think Wanhill was entitled to be nominated and to be elected, his name being on the burgess-roll published on the 22nd of October, 1877. I will only refer to three sections upon which I more immediately rely in arriving at this opinion. The first and principal section is the 22nd section of 5 & 6 Wm. 4, c. 76, which enacts "That the burgess-lists so revised and signed" as in the preceding sections mentioned "shall be delivered by the mayor to the town-clerk of such borough, who shall keep the same, and shall cause the said burgess-lists to be fairly and truly copied into one general alphabetical list in a book to be by him provided for that purpose, with every name therein numbered, beginning the numbers from

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the first name and continuing them in a regular series to the last name, and shall cause such books to be completed on or before the 22nd of October in every year, and shall deliver such books, together with the lists, at the expiration of his office, to the person succeeding him in such office; and every such book in which the said burgess-lists shall have been copied shall be the burgess-roll of the burgesses of such borough entitled to vote after the passing of this Act in the choice of the councillors, assessors, and auditors of such borough as hereinafter [ss. 30–37] mentioned at any election which may take place in such borough between the 1st of November inclusive in the year wherein such burgess-roll shall have been made, and the 1st of November in the succeeding year." Here the election took place on the 1st of November, 1877, and it is admitted that the burgess-roll so copied in October, 1877, is the burgess-roll of voters entitled to elect on the 1st of November in that year; but it is said that a different view of that section is to be taken as to the nomination of a candidate, in respect of the person nominating and the person nominated, and that the former must be upon the roll of persons entitled to vote on the 1st of November, 1876. If that be so, this amongst other inconvenient consequences would follow, viz., that the person who nominates (here, on the 23rd of October, 1877), may not be a person entitled to vote at the election on the 1st of November in that year, the election for which he nominates. It is unnecessary, however, to give any judgment on this point. What we have to decide is upon what roll the person nominated is to be. Here, Wanhill was not upon the roll which came into operation on the 1st of November, 1876. Looking at the language of the section, it seems to me to be more favorable to the nominator being on the roll taking effect on the 1st of November, 1877. The 6th section of 7 Wm. 4 & 1 Vict. c. 76 has not much application.

Then comes the section which treats of the nomination, s. 6 of 22 Vict. c. 35, which enacts that, "at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor, himself (if duly qualified) or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward, as the case may be), and every such nomination shall be in writing, and shall state the

Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the party nominating, and sent to the town-clerk at least two whole days (Sunday excluded) before the day of election; and the town-clerk shall at least one whole day (Sunday excluded) before the said day of election cause the Christian names and surnames of the persons so nominated, with such statement of their respective places of abode and description, and with the names of the party nominating them respectively, to be printed and placed on the door of the town-hall, and in some other conspicuous parts of the borough or ward for which such election is to be held." The respondents' counsel would read that,—any person entitled to vote on the 1st of November, 1876, and up to the 1st of November, 1877, may nominate for the office of councillor any other person to be elected at the election which takes place on the 1st of November, 1877. That seems to me to be a strained and unreasonable construction of the enactment; and to my mind convenience is strongly in favour of the construction contended for by the Solicitor-General, viz. that the person nominating must be on the roll made on the 22nd of October, 1877, though it does not take effect until the 1st of November. That seems to me to be the proper reading of the section. But I do not feel bound to decide that, because the question here is, whether the person nominated is to be on the burgess-roll of 1876, or on that of 1877. It seems to me that the construction contended for by the respondents would give rise to many difficulties. It would require the party to have his qualification continued for two years, that is to say, he must be on the roll for 1876 and also on the roll (or entitled to be on the roll) for 1877. There is nothing to shew that that was contemplated by the Act; and there are other provisions which seem to me expressly to negative it; for instance, s. 5 of 38 & 39 Vict. c. 40 seems to favor the opposite construction sought to be put on the part of the petitioner.

But, before I proceed to that section, I will call attention to s. 1, sub-s. 2, which provides that "at any such election every candidate shall be nominated in writing; the writing shall be subscribed by two inrolled burgesses of such borough or ward as proposer and seconder, and by eight other inrolled burgesses of

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such borough or ward assenting to the nomination. Each candidate shall be nominated by a separate nomination-paper, but the same burgesses or any of them may subscribe as many nomination-papers as there are vacancies to be filled, but no more. Every person nominated shall be inrolled on the burgess-roll of the borough, or a person whose name is inserted in the separate list at the end of the burgess-roll, as provided by s. 3 of 32 & 33 Vict. c. 55, and shall be otherwise qualified to be elected." The counsel for the respondents would read this, that the party must be, not on the burgess-roll which is the existing roll at the time of the election (in this case) for 1877, but on the roll which is past and gone on the 1st of November in that year, and consequently a person whose right of voting has then expired. But, when we come to s. 5, we find the language much more strong in favor of the construction we are adopting. It enacts that, "at any municipal election, a person shall not be entitled to sign or subscribe any nomination-paper, or to vote, unless his name is on the burgess-roll for the time being in force in the borough, or on the ward-list for the time being in force for the ward, for which such election shall be held." It is admitted that the party would not be entitled to vote unless his name was on the new roll, and that the roll for the time being in force in this case was the roll prepared on the 22nd of October, and which came in force on the 1st of November, 1877; but it is said that the words "shall not be entitled to sign or subscribe any nomination-paper, or to vote," are to be taken disjunctively,—that he is not to sign unless he was on the previous roll, or to vote unless he is on the new one. It seems to me that it would require many additional words to warrant such a construction. If we take the words in their simple and ordinary sense, they refer to one roll; and the roll for both objects cannot possibly be the old one, but must be the roll which is to come in force on the 1st of November. The section goes on, "and every person whose name is on such burgess-roll or ward-list, as the case may be, shall be entitled to sign or subscribe any nomination-paper, and to demand and receive a ballot-paper, and to vote." Without straining the words extravagantly, it seems to me clearly to point to one roll and to one roll only, viz. that upon which the election is to take place. It is said that in so deciding we shall

ignore the decision of the Court of Queen's Bench in *Reg.* v. *Harvey.* (1) Undoubtedly that case would at first sight seem to present a difficulty; but, reading the judgment there with s. 22, it is manifest that the two things are distinct. The new roll takes effect from the 1st of November; up to that time, for the purposes of election, the old roll is still in force. The language of Lord Denman which was relied on by the respondents, with the addition of a few words, would be directly applicable here. His Lordship says: "The question was whether the list upon which Mr. Harvey's name appeared at the time of his election was 'the burgess-list' of the borough at the time of his election, within the meaning of the 28th section, and whether his being entitled to have his name upon that list, and it being actually there, qualified him to be elected an alderman on the 29th of October, 1841." And, after referring to ss. 15, 18, 19, and 20, his Lordship goes on: "Some doubt may be raised on the language of the Act of Parliament as to what is intended by the term 'burgess-list,' and whether the list, or rather lists, made out by the overseers, or the general alphabetical list made out by the town-clerk, should be considered the burgess-list; but we are of opinion that, in order to be qualified, the name of Mr. Harvey ought to have appeared upon the list or roll which was in force during the current municipal year ending on the 1st of November, 1841, and that it was not enough that his name should appear upon a list or roll which was not to be in force until the 1st of November, 1841. Had Mr. Harvey's name been upon the list or roll which was in force during the current year between the 1st of November, 1840, and the 1st of November, 1841, he would clearly have been qualified, though his name had not been on the list upon which it is now; and it seems equally clear that the legislature did not intend that there should be *two* burgess-lists containing different names in operation at the same time at any period during the current year. The proceedings which take place with respect to the burgess-lists between the 5th of September and 1st of November in any year are only for the preparation of that which is to be the burgess-list or roll for the year beginning on the 1st of November; and, until that day arrives, the placing of a name upon such list

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or roll will give no qualification to the party whose name is so placed, the list or roll of the former year being the burgess-list or roll till the 1st of November." I see nothing in that judgment which is inconsistent with that which I am now pronouncing.

I come now to the question whether we have jurisdiction to entertain or determine this matter. The first section which applies to that question is s. 12 of 35 & 36 Vict. c. 60, which enacts that "the election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided [s. 14] and hereinafter in this Act referred to as the 'court,' on the ground that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes." And that section further provides that "an election shall not, except in the manner provided in this Act, be questioned upon an information in the nature of a quo warranto or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act." It is contended on the part of the respondents that we have no power to determine this case, because it falls into none of the categories referred to in that section. As at present advised, I think that section does authorize us to entertain this case. We hold these persons to be disqualified for election to the office for which the election was held, on the ground that they were not duly elected by a majority of lawful votes. If the nomination-paper of Wanhill had not been held bad, the votes might have been differently given. If the enactment is not to be so read, our jurisdiction would be very limited indeed. Fairly construing the statute, I think this case falls within the words I have referred to. But, if it does not, there is another enactment the words of which are so clear as to put the matter beyond doubt. I refer to s. 1, sub-s. 3, of 38 & 39 Vict. c. 40, which provides that every nomination-paper subscribed

as aforesaid shall be delivered by the candidate himself or his proposer or seconder to the town-clerk, &c. The mayor shall attend at the town-hall on the day next after the last day for the delivery of nominations to the town-clerk, between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination-paper, such objection to be in writing. . . . The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination-paper, be final, but, if allowing the same, shall be subject to reversal on petition questioning the election or return." Words cannot express it more clearly. The mayor has allowed an objection to a nomination-paper; and this is a petition questioning the election or return. But it is said that the interpretation clause s. 20, sub-s. 2, of 35 & 36 Vict. c. 33, gives these words a different effect from that which is their obvious meaning,—"The term 'petition questioning the election or return' shall mean any proceeding in which a municipal election can be questioned." It is said that that applies not only to a petition questioning the return, but also to a quo warranto. But, if that be so, it cannot negative or limit the effect of s. 1, sub-s. 3, of 38 & 39 Vict. c. 40. I cannot call to mind any case in which an interpretation clause in a previous Act has been allowed to control or limit the effect of provisions in a subsequent Act. But, apart from that, I see nothing in that clause which is inconsistent with the primary and obvious meaning of the words of s. 1, sub-s. 3, of 38 & 39 Vict. c. 40.

Upon both grounds, therefore, I am of opinion that the election is void. *Non constat* that, if the nomination of Wanhill had not been disallowed, one or all of these respondents might not have been elected. A different result might have taken place.

It is suggested that Rogers ought not to be affected by our decision, inasmuch as it turns upon a point which does not apply to him. If the special case had been so stated as to separate his case from that of the other three respondents, that might possibly have been a reasonable contention. But here the four persons named are bracketed together as respondents. The facts are stated, and certain objections are raised, to all of which each of the respondents appears to be a party. I see no reason why

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any exception should be made in favor of Rogers. We decide that the election is void, and that the costs be paid by the respondents.

LINDLEY, J. I am of the same opinion. A key to the whole is to be found in the construction of s. 1, sub-s. 3, and s. 5, of 38 & 39 Vict. c. 40. From that time there are to be two burgess-rolls,—one to regulate all elections which take place during the year ending on the 1st of November in any year, the other regulating elections which take place upon or after that day. To hold that the old roll is to regulate elections taking place after the expiration of the year to which that roll is applicable, would be contrary to the spirit of the Act.

LOPES, J. I entirely concur.

Judgment for the petitioner.

Solicitors for petitioner: *C. C. Ellis, Munday, & Co.*
Solicitors for respondents: *Peacock & Goddard.*

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COMPANY—*Action to recover back Money paid for Shares, on the ground of Fraud—Voluntary winding up—Companies Acts*, 1862 *and* 1867—*Construction of Agreement—Calls—Notice of Call.*] The principle of *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) extends to the voluntary winding up of a company formed under the Companies Acts, 1862 and 1867. Where, therefore, a company, its assets being insufficient to meet its liabilities, is voluntarily wound up, a shareholder in such company, who has been induced to take shares by the fraudulent representation of its directors, cannot repudiate his shares, nor seek to rescind a contract in respect of them, nor can he recover back from the company money paid by him for the shares.—The notice to the shareholders convening the meeting at which an extraordinary resolution was passed to wind up a bank voluntarily and appoint a liquidator (in which was embodied an agreement by the directors with B. & Co., a London banking firm, to transfer to the latter all the assets of the bank upon their undertaking the debts and liabilities of the bank, not including any claims of shareholders to have money repaid to them on the ground of fraud), was in the words of s. 129, clause 3, of the Companies Act, 1862:—*Held*, by Lindley, J., that the notice was sufficient and the resolution binding on all the shareholders of the bank (under s. 136), whether they were present and voted for it or not.—By the agreement ment referred to in the above resolution it was provided, amongst other things, that B. & Co. should pay all the debts and liabilities of the bank, and should indemnify the bank and the shareholders against the same; that the whole assets of the bank, "including under such term the uncalled capital and any arrears of calls already made," should be transferred by the bank to B. & Co., who should be empowered to collect and get in all the said assets of the bank; and that the bank should admit B. & Co. as creditors against the bank in respect of all payments made by them to or on behalf of the bank:—*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the effect of this arrangement was to keep alive the debts and liabilities as against the bank, and in favour of B. & Co., to the extent necessary to entitle the latter to recoup themselves, in respect of their payments, out of the assets of the bank, including its uncalled capital.—By the articles of the association of the bank every shareholder was required to pay calls to the person and at the time and place appointed by the directors; and twenty-one days' notice was to be given of the time and place appointed. By a resolution of the directors before a voluntary winding up, they made a call payable by instalments at certain dates, but no place or person at which or to whom the call was to be paid was mentioned, and no notice of the call was given by the directors; after the winding up the liquidator gave notice to the shareholders that a call had been made, and requested them to pay it to certain persons at a specified place and time:—*Held*, by Bramwell, Brett, and Cotton, L.JJ., in the Court of Appeal, affirming the judgment of Lindley, J., that the liquidator had power to enforce the call made by the directors, and that the notice given by him was sufficient under the Companies Act, 1862, s. 95, clauses 4 and 8, and s. 133, clauses 5 and 7. Stone *v.* City and County Bank [C. A. 282

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2. —— *Scire Facias—Companies Clauses Consolidation Act*, 1845 (18 *Vict. c.* 16), *s.* 36—*Director named in Special Act—Resignation of Directorship—Implied Surrender of Inchoate Right to take Shares and Implied Acceptance of such Surrender.*] A railway company was incorporated by a special Act passed in June, 1866, in which T. and A. were nominated directors, until the first ordinary meeting of the company, and which provided also that the qualification of a director should be the possession of fifty shares. In August, 1866, T. sent in his resignation as director, and S. was informally appointed director in his stead, and thenceforward continued to act as such. T. took no part in the affairs of the company, never applied for any shares, none were allotted to him, and though calls were made, no notice thereof was given to him. A. acted as director until December, 1867, when he also resigned his directorship; shortly afterwards B., who had not previously acted as a director, and whose name was not in the special Act, attended the meetings of the board as director. No shares were ever allotted to A. No first ordinary meeting of the company was ever held. After the resignations of T. and A. an informal register of shareholders was drawn up, from which it appeared that the whole number of shares constituting the capital of the company had been allotted to other persons than T. and A. After the resignations of T. and A. the railway company became indebted to the D. Banking Company. In February, 1876, the plaintiff as public officer obtained judgment against the railway company for 18,000*l.*, and in November issued execution against them; the execution being unsatisfied, he issued, in July, 1877, writs of scire facias upon the judgment against T. and A. as holders severally of fifty shares in the railway company:—*Held*, that the writs of scire facias could not be maintained against T. and A., for it was to be inferred from the facts above stated that the railway company had accepted from T. & A. a surrender of the inchoate right to shares which they possessed under the special Act; that the evidence of an acceptance of the surrender of an inchoate right need not be as express as would be required in the case of the surrender of specific shares actually allotted; and that the lapse of years, during which the railway company had not treated T. and A. as shareholders, was strong evidence that they had abandoned all rights against them; and that, the plaintiff's causes of action having accrued since their resignations, T. and A. were not estopped as against him from denying their liability as shareholders; and that he could not be in a better position as regarded them than the railway company.—*Portal* v. *Emmens* (1 C. P. D. 201, 664) distinguished. Kipling *v.* Todd [C. A. 350

CONVERSION—*Vendor and Purchaser—Delivery of Goods to Order of Third Party assenting to pay—Resumption of Possession by Vendor—Conversion—Measure of Damages.*] The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed the defendant waggon company to make them according to sample at a lower price. The company afterwards proposed

CONVERSION—*continued.*

to receive payment direct from the plaintiffs, who consented and were authorized by L. to pay them. Some waggons were delivered by the waggon company to the defendant railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies for conversion:—*Held* (1.) That, the property in the goods and the right to possession of them having passed to the plaintiffs, both defendants were liable:—(2.) That the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price. Johnson *v.* Lancashire and Yorkshire Railway Company - 499

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6 *Geo.* 4, *c.* 94, *s.* 2.] H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock-warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock-warrants. Both the defendants acted in good faith, and took fresh dock-warrants from the dock company:—*Held*, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4 c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants. JOHNSON *v.* CREDIT LYONNAIS COMPANY - - C. A. 32

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2. —— *Costs*—*Necessaries*—*Extra Costs in a Suit for a Divorce*—*Divorce Acts*, 20 & 21 *Vict. c.* 85, *ss.* 51, 54, *and* 21 & 22 *Vict. c.* 108, *ss.* 13, 14.] A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue

HUSBAND AND WIFE—*continued.*

the husband for "extra costs," i.e., costs reasonably incurred by him beyond the costs taxed and allowed as between party and party.—His common law right to sue the husband as for "necessaries" supplied to the wife is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts. OTTAWAY *v.* HAMILTON - - - - C. A. 393

INFANT—*Promise of Marriage—Ratification—37 & 38 Vict. c. 62 (The Infant's Relief Act, 1874), s. 2—Fresh Promise—Evidence of.*] The Infant's Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2, providing that, "no action shall be brought whereby to charge any person upon . . . any ratification made after full age of any promise or contract made during infancy . . ." applies to promise of marriage.—The defendant, during his infancy, promised to marry the plaintiff, and, after coming of age, recognised without expressly repeating the promise, and eventually broke it.—The plaintiff sued him for the breach, and was nonsuited:—*Held*, that the nonsuit was right; for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age. COXHEAD *v.* MULLIS - - - - 439

INFORMER, COMMON—Guardians suing for penalty, as - - - - 377
See CORPORATION.

INJUNCTION—To restrain future publication of libel - - - - - 339
See LIBEL. 1.

INSURANCE (MARINE)—*Constructive Total Loss—Abandonment, Notice of—Ship, Sale of.*] Where the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold. KALTENBACH *v.* MACKENZIE C.A. 467

INTERLOCUTORY PROCEEDING—Appeal from order to sign judgment - - 67
See PRACTICE. 8.

INTERPLEADER—*Indorsee of Dock-Warrant—1 & 2 Wm. 4, c. 58, s. 1—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12—Different Liabilities—Damages for Detention—Contract for Sale of Goods induced by Fraud—Property in Goods obtained by Fraud.*] S. was the agent of L. a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.: the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with the defendants, a dock company, who issued warrants for the same: some of the wine therein mentioned was made deliverable to the

INTERPLEADER—*continued.*

order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiffs to secure advances. L. afterward served notice upon the defendants not to part with the wine: thereupon the defendants refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:—*Held* (reversing the decision of the High Court of Justice), that the defendants were entitled to an interpleader order under 1 & 2 Wm. 4, c. 58, s. 1, and the Common Law Procedure Act, 1860, s. 12, for the right to the wine might be determined as between the plaintiffs and L., and the actions might be stayed as to that, and might be continued as to the claims for damages, and by issuing the dock-warrants the defendants had not debarred themselves from obtaining relief under those statutes.—*Crawshay* v. *Thornton* (2 My. & Cr. 1) discussed.—*Held*, also, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon the plaintiffs, and that L. must be barred upon the plaintiffs undertaking to account to him for the value of the wine after deducting their advances. ATTENBOROUGH *v.* LONDON AND ST. KATHARINE'S DOCK COMPANY [373; C. A. 450

INTESTACY—As to real estate - - 344
See WILL.

JOINT CONTRACTOR—Judgment against one, a defence to action against another 403
See PARTNERSHIP.

JUDGMENT—Against one joint contractor, a defence to action against another 403
See PARTNERSHIP.

JURISDICTION—Of Court of Appeal - 489
See PRACTICE. 1.

—— Of inferior Court—Counter-claim involving matters beyond local jurisdiction 228
See PROHIBITION.

—— Of Lord Mayor's Court - - 18
See MAYOR'S COURT.

JURY—Right to—Cause ordered to be tried in County Court - - - 21
See COUNTY COURT.

JUSTICE—Report of proceeding before—How far privileged - - - - 319
See LIBEL.

LAND—Action for recovery of—Discovery 196
See PRACTICE. 7.

LANDLORD AND TENANT—*Yearly Tenancy—Agreement for Six Months' Notice to quit—The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51—Year's Notice.*] A yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that "Where a half year's notice, expiring with the year of tenancy, is by law necessary and sufficient for

LANDLORD AND TENANT—*continued.*
determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same." Wilkinson *v.* Calvert - - - 360

2. —— *Custom of the Country as to Seeds, Tillages, &c.*] Primâ facie the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm.—Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them; yet an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, cannot be supported. Bradburn *v.* Foley - - 129

3. —— "*Lodger*"—*Lodgers' Goods Protection Act*, 1871, 34 & 35 *Vict. c.* 79.] By an agreement in writing the plaintiff hired from F. rooms in a house held by her under an unexpired lease from the defendant, for which the plaintiff was to pay F. 27*l.* 10*s.* per quarter, she paying rates and taxes, and keeping the premises in repair. The rooms so hired by the plaintiff substantially constituted the whole house, F. only retaining possession of the housekeeper's room on the basement and of two or three empty attics and a stable. Rent being due from F. to the defendant, the latter distrained and sold household furniture belonging to the plaintiff, who, relying upon the provisions of the Lodgers' Goods Protection Act, 1871, sued him for an illegal distress:—*Held*, that, although the agreement under which he held might make him an "undertenant," the plaintiff was not the less a "lodger" entitled to the protection of the statute. Phillips *v.* Henson [26

4. —— *Notice to quit—Customary Half-year.*] A six months' notice to determine a yearly tenancy commencing on one of the ordinary Feast-days, means a "customary six months," that is, from one of the usual quarter-days to the quarter-day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently, a notice served on the 26th of March, to quit on the 29th of September then next, is not a valid notice. Morgan *v.* Davies - - 260

5. —— *Lease, Construction of—Covenant to pay Taxes, &c.*] Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement except land-tax and landlord's property-tax," and further "to pay and discharge all and all manner of taxes, rates, charges, assessments, and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof or of the said rent as aforesaid, by authority of parliament or otherwise howsoever."—During the term the lessor received from the sanitary authority a notice, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94, to abate a nuisance injurious to health arising from the bad condition of the drains upon the premises, and in order to

LANDLORD AND TENANT—*continued.*
prevent proceedings against him, executed the required works:—*Held*,—upon the authority of *Tidswell* v. *Whitworth* (Law Rep. 2 C. P. 326)—that, the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the demised premises or in respect thereof," but in performance of a duty imposed upon him by the Act of Parliament, he was not entitled to call upon the lessee under his covenant to re-pay the amount.—*Thompson* v. *Lapworth* (Law Rep. 3 C. P. 149) distinguished. Rawlins *v.* Briggs - 368

—— Sale of lease of public-house - - - 52
See Vendor and Purchaser.

LEASE—Of public-house—Common and usual covenant - - - - - 52
See Vendor and Purchaser.

LIBEL—*Injurious to Plaintiff in his Trade—Injunction to restrain future Publication—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] The Court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous.—*Semble*, that this power may be exercised by the judge who tries the cause.—*Prudential Assurance Co.* v. *Knott* (10 Ch. 142), and *Thorley's Cattle Food Co.* v. *Massam* (6 Ch. D. 582), considered. Saxby *v.* Easterbrook 339

2. —— *Privileged Publication—Ex parte Proceeding before a Police Magistrate in a Matter over which he has no Jurisdiction.*] Three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate:—*Held*, a privileged publication. Usill *v.* Hales - 319

LICENCE—To keep dog—Date of operation 105
See Day.

LIMITATIONS STATUTE OF—*Promise to revive a Debt under* 9 *Geo* 4, *c.* 14, *s.* 1—*Conditional Promise.*] In May, 1874, the defendant, in answer to a demand of a debt incurred by him in 1865, wrote to the plaintiffs as follows:—"Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." It was admitted that in one year since 1874 the defendant's income had been 14*l.* more than it was and since had been:—*Held*, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and there was no affirmative proof of the substantial fulfilment of the condition. Meyerhoff *v.* Froehlich 333

LIST—Of voters, amendment - - 92
See Parliament. 3.

LOCAL BOARD—*Bye-Law, Reasonableness of, and Mode of Publication—Rhyl Improvement Act*, 15 *Vict. c. xxxii—Public Health Acts*, 1848, 1858.]

LOCAL BOARD—*continued.*

Under a local Act incorporating the provisions of the Public Health Acts, 1848 and 1858, bye-laws were made, by which it was amongst other things provided that "every person who shall intend to erect any new building shall give a week's notice to the town surveyor of such intention, by writing delivered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building," &c.; and a penalty not exceeding 5*l.* is imposed for non-compliance with this requirement.—The appellant, without giving such notice or delivering any plans, erected certain structures which from their description could not be intended for residential purposes, and which were found by the justices, upon a case stated under 20 & 21 Vict. c. 43, to have been erected for a temporary purpose only, and to have been intended to be pulled down by the appellant when that purpose was answered:—*Held*, that a conviction under the above-mentioned bye-laws could not be sustained, inasmuch as such bye-laws, if intended to apply to such structures, were unreasonable and bad.—By the local Act (passed in 1847) the commissioners were empowered to make bye-laws, which were to be published by being printed and a copy delivered to every person applying for the same, and by painting or placing on boards to be hung up on the front of the office of the commissioners, and also on some conspicuous part of the works or locality to which the same related. Under the Public Health Acts, 1848 and 1858, the prescribed mode of publication of bye-laws is by "printing and hanging the same up in the office of the local board:"—*Held*, that a publication in the manner prescribed by the last-mentioned Acts was sufficient. Fielding *v.* Rhyl Improvement Commissioners - - - - - 272

2. —— *Corporations, Contracts by—Distinction between trading Corporations and Local Boards or Corporations created for Public Purposes—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 85—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.] Sect. 85 of the Public Health Act, 1848, and s. 174 of the Public Health Act, 1875, enact (without any words of prohibition) that "every contract made by a local board, or by an urban authority, whereof the value or amount exceeds [10*l.*] 50*l.*, shall be in writing, and sealed with the common seal of such authority."—The defendants, a "local board" and an "urban authority" under the above-mentioned Acts, verbally directed their surveyor to employ the plaintiff to prepare plans for new offices. The plans were prepared and submitted to and approved and used by the defendants, but the proposed offices were never erected. There was no contract under the corporate seal, nor any ratification under seal of the act of the surveyor in procuring the plans: nor was there any resolution of the board authorizing their preparation:—*Held*, that, by reason of the non-compliance with the statutory requirements, the contract could not be enforced,—notwithstanding that the jury found that the board authorized their surveyor to procure the plans and ratified his act, that new offices were necessary for the purposes of the defendants, and that the plaintiff's plans were necessary for the erection of them. Hunt *v.* The Wimbledon Local Board - - - 208

"LODGER"—"Lodger" or "undertenant" 26
See Landlord and Tenant. 3.

LUGGAGE—Of passenger by railway - 221
See Railway Company. 2.

MANOR—Vote in respect of occupation of waste
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MARRIAGE—Promise of - - - 439
See Infant.

MARRIED WOMAN—Action to charge separate estate - - - - 197
See Husband and Wife. 1.

MASTER AND SERVANT—*Goods damaged by Artificer—Delivery thereof to him as Wages—Payment otherwise than in Coin—Truck Act* (1 & 2 *Wm.* 4, *c.* 37), *ss.* 3 & 9.] An artificer in a trade within the Truck Act (1 & 2 Wm. 4, c. 37), having, through negligent workmanship, damaged a piece of cloth, his employer delivered to him the damaged cloth instead of such wages earned as were equivalent to the value which, according to the assessment of the employer, the cloth would have had if undamaged:—*Held*, that the employer had paid wages otherwise than in current coin, and was therefore liable to a penalty under sect. 9 of the Act. Smith *v.* Walton - - - 109

—— Injury to workman from negligence of foreman - - - - - 492
See Negligence. 3.

MAYOR'S COURT—Appeal from - - 489
See Practice. 1.

MAYOR'S COURT, LONDON—"*Carrying on Business" within the Jurisdiction*—20 & 21 *Vict. c. clvii. s.* 12.] The South Eastern Railway Company have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:—*Held*, that the company do not "carry on business" within the jurisdiction of the Mayor's Court, within the meaning of s. 12 of the Mayor's Court Extension Act, 1857.—*Brown v. London and North Western Ry. Co.* (32 L. J. (Q.B.) 318) followed. Le Tailleur *v.* South Eastern Railway Company - - 18

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict. c*, 120), *ss.* 6, 16, 17, 18, 54—*Metropolis Management Amendment Act*, 1856 (19 & 20 *Vict. c.* 112), *s.* 4—*Election of Vestrymen*—"*Rated or Assessed*"—*Acting without Qualification—Penalty—Inspectors of Votes—Finality of Decision as to Persons chosen to act as Vestrymen—Claim to be rated—Payment or tender of last-made Rate.*] The defendant was joint occupier with his father and brother of certain hereditaments in a metropolitan parish of sufficient value to entitle him to be elected vestryman; a rate was made in April, 1876, upon the father only; in May the defendant was elected vestryman; an objection was raised to his return, but the inspectors of votes declared him to be duly qualified and elected; in June the defendant sat and voted as vestryman; in July he required the demand-note of the rate made in April to be altered so as to extend to himself as well as to his father, and in October he

METROPOLIS MANAGEMENT ACT, 1855—*cont.*
jointly with his father paid the rate:—*Held*, that the defendant in May was neither "rated" nor "assessed" within the meaning of the Metropolis Management Act, 1855, s. 6, and was not qualified for election as vestryman; that the decision of the inspectors of votes as to his election was not conclusive; that by sitting and voting as vestryman in June he had incurred the penalty imposed by s. 54 of that statute for acting without qualification; and that his liability to the penalty was not taken away, upon the subsequent payment of the rate, by the Metropolis Management Act, 1856, s. 4. GOODHEW *v.* WILLIAMS [C. A. 382

MUNICIPAL ELECTION — *Burgess-Roll—Objection to Nomination-Paper — Jurisdiction of the Court—5 & 6 Wm. 4, c. 76, ss. 22—22 Vict. c. 35, s. 6—35 & 36 Vict. c. 60, s. 12—38 & 39 Vict. c. 40, s. 1, sub-s. 2, and s. 5.*] Every person whose name is on the burgess-roll of a borough published on the 22nd of November in any year, pursuant to s. 22 of 5 & 6 Wm. 4, c. 76, is entitled to be nominated for election as a councillor, and to be elected, at the election which takes place on the 1st of November ensuing; it is not necessary that he should also be on the roll in force at the time the nomination-paper (under 38 & 39 Vict. c. 40, s. 5) is signed.—*Quære*, whether a burgess on the roll in force at the time of the nomination, but not on the roll upon which the election proceeds, can properly be a nominator?—Where the mayor of a borough has, under s. 1, sub-s. 3, of 38 & 39 Vict. c. 40, improperly allowed an objection to a nomination-paper, the Court has jurisdiction under 35 & 36 Vict. c. 60, s. 12, to entertain a case questioning the validity of the election. BUDGE *v.* ANDREWS - - - - 510

NEGLIGENCE — *Injury to Cattle from defective and improper Fencing—Landlord and Tenant.*] The plaintiff and the defendants respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease the defendants were bound to fence the land in their occupation for the benefit of the lessor and his tenants. About twenty years ago the predecessors of the defendants had fenced their land with wire rope, and the defendants allowed this fence to remain, and from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture occupied by the plaintiff. The plaintiff's cow grazing there swallowed one of these pieces, and died in consequence:—*Held*, that the defendants were liable to compensate the plaintiff for the loss of the cow. FIRTH *v.* BOWLING IRON COMPANY - - - 254

2. —— *Construction of Public Works—Highway or Sewer Authorities—Notice of Action under Public Health Act* (11 & 12 *Vict. c.* 63), *s.* 139.] The defendants, who were both the highway and the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the defendants' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiffs' horse, in consequence of the surface giving way, fell into the trench, and was injured:—*Held*, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the defendants,—either as the sewer or the highway authority, or as both,—were responsible. —The notice of action (under 11 & 12 Vict. c. 63), s. 139, stated that the plaintiffs intended to enter a plaint against the defendants for the injury and damage caused to them through the defendants by matters or things done or omitted by them and their laborers and servants, &c., to wit, that they did, by themselves, their laborers and servants, "negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair, whereby," &c.:—*Held*, that this was a sufficient intimation to the defendants that they were to be charged with an act of misfeasance, and not merely with a neglect of duty to repair the road. SMITH *v.* WEST DERBY LOCAL BOARD - - - - 423

3. —— *Master and Servant—Common Employment—Concealed Danger.*] The defendants were brewers, having upon the river T., a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants, at the rate of 1*s.* 9*d.* for every ton of coals discharged; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants', who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved:—*Held*, that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant, by whose negligence the injury happened, and there was no concealed danger. CHARLES *v.* TAYLOR - - - C. A. 492

4. —— *Ship—Liability of "Managing Owner" for negligence of Captain trading independently and rendering a Share of Profits to Owner—Merchant Shipping Act*, 1875 (38 & 39 *Vict. c.* 88), *s.* 4, *sub-s.* 5.] A sloop was navigated under a verbal agreement between A., the "managing owner," registered according to the Merchant Shipping Act, 1875, and B., the captain, by which, on condition that A. should have one-third of the net profits, accounts of which were to be rendered to him by B. from time to time, B. was at liberty to go to any port, and take or refuse any cargo he chose, and was also to hire and pay the

NEGLIGENCE—*continued.*
crew and supply the stores, A. having no control over the vessel. While discharging cargo under a charter made by B. "for and on behalf of the owner," the vessel, through the negligence of B., broke loose from her moorings and damaged the wharf of the plaintiff, who brought an action against A. and B.:—*Held*, that the agreement did not amount to a demise of the vessel and, whatever was the precise relationship thereby created between the defendants inter se, A. was responsible to the public for the negligence of B., and, therefore, both were liable in the action. Steel *v.* Lester - - - - - 121

—— Loss of passenger's luggage on railway 221
See Railway Company. 2.

—— Improper stowage of cargoes - - 410
See Ship and Shipping. 5.

—— Misdelivery of telegram - - 1
See Telegraph Company.

NEWSPAPER — Report of proceedings before justice without jurisdiction - 319
See Libel.

NOTICE—Of action—Highway authority - 423
See Negligence. 2.

—— Of call—convening meeting for winding up company - - - - 282
See Company. 1.

—— To quit—Agricultural Holdings Act, 1875
See Landlord and Tenant. 1. [360

—— To quit—Customary half-year - 260
See Landlord and Tenant. 4.

NUISANCE—*Action for Injury caused to an Adjoining Occupier — Owner of Land, Duty of—Negligence—Water, Percolation of.*] A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:—*Held*, upon demurrer, that the statement of claim disclosed a good cause of action. Hurdman *v.* North Eastern Railway Company [C. A. 168

OFFENCE—Against licence—How far affected by grant of licence on same day - 105
See Day.

OFFICIAL REFEREE—No power to order judgment to be entered - - 142
See Practice. 10.

PARLIAMENT — *County Vote — Disqualification by reason of Bribery—31 & 32 Vict. c. 125, s. 43.*] In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge and consent, under 31 & 32 Vict. c. 125, s. 43, he must be *found* by the report of the election judge under s. 11, sub-s. 14, to have been so guilty; it is not enough that the judge states facts from which personal bribery or other corrupt practice might be inferred. Grant *v.* Overseers of Pagham 80

2. —— *Borough Vote — "Residence" within the Borough or within Seven Miles thereof—Reform Act, 2 Wm. 4, c. 45, s. 33.*] The residence required to entitle a person to be registered as a voter for a borough, under s. 33 of the Reform Act, 2 Wm. 4, c. 45, need not be an occupation as owner or tenant; but any actual residence for the prescribed period within the borough, or within seven miles thereof, is sufficient.—For a portion of the six months previous to the last day of July in the qualifying year, viz. from the 29th of March to the 29th of May, A. lived and slept with his wife and child in a room in a cottage allotted to the wife's mother by the trustees of a charity, the rules of which prohibited the inmates from allowing any stranger to reside with them:—*Held*, that this was a sufficient residence to satisfy s. 33; and that the continuity of residence was not broken by A.'s absenting himself for one night, when sent to London upon his employer's business. Beal *v.* Ford - - - - - - 73

3. —— *County Vote—Amendment or Correction of Mistake in List of Voters—6 Vict. c. 18, s. 40.*] On the register of voters for a parish in a county, the name of a voter appeared under the heading "Voters in respect of property, including occupiers of 50*l.* and upwards." His true qualification was as a 12*l.* occupier, but his name had been omitted by the overseers from the list of 12*l.* occupiers made out by them, and he had made no claim to be placed thereon, as provided by 31 & 32 Vict. c. 58, s. 17:—*Held*, that there had been a mistake in a list, within the meaning of 6 Vict. c. 18, s. 40, which should have been amended by the insertion of the voter's name in the list of 12*l.* occupiers. Ballard *v.* Robins - - 92

4. —— *County Vote — Freehold — Waste of Manor.*] A. claimed to vote for a county in respect of a lease of part of the waste of the manor of N. granted to him in 1861 by the lord for the lives of A., his son, daughter, and grandson, with a covenant to add lives, pursuant to a presentment made under the following circumstances:—At the courts-leet and courts-baron it had been the practice of the mayor and burgesses (who had rights of common of pasture over the wastes of the manor) for one hundred years and upwards, to present to the lord individual burgesses for occupation of pieces of the common or waste lands, and most commonly with the addition, after naming such burgess, "he to agree with the lord for the rent." In all cases, the persons so presented took possession of the apportioned plots of land, generally building cottages and other buildings thereon, and paid the rents to the lord which he had fixed; such rents being very small sums, varying according to circumstances. No duration of the holding was specified in such presentments; but, upon the death of the person presented, his personal representatives continued to occupy and pay rent to the lord without further reference to the court-leet:—*Held*, that A. had a sufficient freehold interest in the land so held by him (the value not being disputed) as to entitle him to be registered as a voter for the county. Phillips *v.* Salmon - - - - - 97

PARTNERSHIP—*Joint and Several Liability—Judgment recovered against one joint Contractor, and relied upon as a defence to a subsequent Action against another joint Contractor.*] Before the coming into operation of the Judicature Acts,

PARTNERSHIP—*continued.*

1873, 1875, at common law a judgment recovered against one joint contractor was a bar to a subsequent action against any other joint contractor; and in equity, although upon the death of a partner his estate might become subject to a several liability, yet during the lifetime of the partners the legal effect and incidents of a contract entered into by the partnership remained unaltered; and therefore since the coming into operation of the Judicature Acts, 1873, 1875, a contractee, who has obtained judgment against one member of a partnership for breach of a contract entered into by it, cannot maintain an action in respect of the same breach against another member of the partnership.—The defendant was interested in a contract made by the plaintiffs with the firm of W. & Co., and as to the contract was in the position of a dormant partner with respect to that firm. The plaintiffs obtained judgments against the members of the firm of W. & Co. other than the defendant in respect of breaches of that contract, and after coming into operation of the Judicature Acts, 1873, 1875, commenced the present action against the defendant alone for certain sums of money, which were included in the judgments obtained by them against the firm of W. & Co.:—*Held*, that the cause of action against the defendant was merged in the judgments obtained against the members of the firm of W. & Co., and that the present action was not maintainable. KENDALL *v.* HAMILTON [C. A. 403

PENALTY—Action for by corporation - 377
See CORPORATION.

—— For acting as vestryman without qualification - - - - - 382
See METROPOLIS MANAGEMENT ACT.

PLEADING—Notice in lieu of statement of claim
See PRACTICE. 9. [280

PLEDGE—By paid vendor of goods - 32
See FACTORS ACT.

POUNDAGE—Recovery of judgment debt without sale - - - - - 216
See SHERIFF.

PRACTICE—*Court of Appeal, Jurisdiction of—Inferior Court—Mayor's Court—Judicature Act*, 1873, *s.* 45.] The Mayor's Court is an inferior Court within s. 45 of the Judicature Act, 1873, and no appeal lies to the Court of Appeal from the decision of a divisional Court on appeal from the Mayor's Court, unless special leave to appeal has been given, under that section. APPLEFORD *v.* JUDKINS - - - - C. A. 489

2. —— *Court of Appeal—Jurisdiction—Appeal against Judgment entered upon Erroneous Finding of Jury—New Trial—Rules of Supreme Court, Order XXXIX., Rule* 1*a*, *Order XL. Rule* 4.] When the judge at a trial with a jury directs a finding to be given upon facts which are not really in dispute, and thereupon gives judgment for the party in whose favour the finding is entered, the party, against whom judgment is given, if he is dissatisfied with the finding, may apply to a divisional Court for a new trial, but cannot in the first instance appeal from the judgment to the Court of Appeal. YETTS *v.* FOSTER [C. A. 437

PRACTICE—*continued.*

3. —— *Appeal—Staying Payment of Costs.*] The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund in case of the order being reversed.—Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to the applicant. GRANT *v.* BANQUE FRANCO-EGYPTIENNE C. A. 202

4. —— *Bankruptcy—Security for Costs—Filing Petition under the Bankruptcy Act.*] Security for costs, where the plaintiff has become bankrupt or has filed a petition for liquidation, is not necessarily confined to *future* costs, but may, when applied for promptly, be extended to costs already incurred in the suit.—*Oxenden* v. *Croper* (4 Dowl. 574) overruled. BROCKLEBANK *v.* KING'S LYNN STEAMSHIP COMPANY - - - - 365

5. —— *Detinue—Costs where Verdict under* 20*l.—County Court Acts*, 8 *&* 9 *Vict. c.* 95, *s.* 129; 13 *&* 14 *Vict. c.* 61, *s.* 11; 30 *&* 31 *Vict. c.* 142, *s.* 5.] In an action, claiming the return of a picture or its value and damages for its detention, the plaintiffs recovered a verdict of 10*l.*, being its value as assessed by the jury, and 1*s.* damages for its detention:—*Held*, reversing the decision of the Common Pleas Division, that the action was founded on tort, within the meaning of 30 & 31 Vict. c. 142, s. 5, and the plaintiffs were entitled to their costs. BRYANT *v.* HERBERT 189; C. A. 389

6. —— *Taxation of Costs—"Instructions for Brief"—Refreshers—Allowance for Scientific Witnesses qualifying themselves—Attendance of such Witnesses at the Trial—Rule* 8 *of "Special Allowances*, 1875."] The charges for "Instructions for Brief," for "scientific witnesses qualifying themselves to give evidence," for "copies of documents furnished to counsel," and for "refreshers to counsel," are purely in the discretion of the master.—Rule 8 of the "Special Allowances" in the scale of 1875 so far qualifies the rule of 1853 as to allowance to witnesses, as to enable the master in his discretion to allow so much for the attendance of scientific witnesses at the trial as shall appear to him to be "just and reasonable."—The same rule authorizes the master to allow in the charge for "Instructions for Brief" the reasonable expenses of such witnesses qualifying themselves to give evidence. TURNBULL *v.* JANSON 264

7. —— *Discovery—Action for recovery of Land—Affidavit of Documents—Defendant's Title—Judicature Act*, 1875, *Order XXXI., rr.* 12, 13.] The defendant in an action for the recovery of land of which he is in possession may be compelled by order under Order XXXI., Rule 12, to make an affidavit of his documents of title, although he may have a right to object to produce them. NEW BRITISH MUTUAL INVESTMENT COMPANY *v.* PEED [196

8. —— *Order empowering Plaintiff to sign Judgment upon specially indorsed Writ—Final or Interlocutory Proceeding—Appeal from High Court of Justice—Time within which Appeal must be brought—Rules of Supreme Court, Order XIV., and Order LVIII., Rule* 15.] An order empowering a plaintiff to sign judgment upon a specially

PRACTICE—*continued.*

indorsed writ is an interlocutory, and not a final proceeding, for it does not become effectual against the defendant until it has been perfected by the further step of signing the judgment; and therefore an appeal upon an order of this kind made by one of the divisions of the High Court of Justice must be brought before the expiration of twenty-one days. STANDARD DISCOUNT COMPANY *v.* LA GRANGE - - - **C. A. 67**

9. —— *Pleading—Specially Indorsed Writ, Order III., r. 6—Notice in lieu of Claim, Order XXI., r. 4—Demurrer, Order XXVIII., r. 1.*] A writ specially indorsed (Order III., Rule 6), and notice delivered as a statement of claim (Order XXI., Rule 4) together form a "pleading" which may be demurrable (Order XXVIII., Rule 1.)—Such a "pleading" shewed the claim to be for breach of an alleged agreement which was apparently without consideration;—*Held*, bad on demurrer. ROBERTSON *v.* HOWARD - **280**

10. —— *Reference under Judicature Act*, 1873, *ss.* 56, 57—*Official Referee—Reference for Report—Reference for Trial.*] The Court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and, if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.—An official referee has no power to order judgment to be entered on any questions referred to him under ss. 56, 67, of the Judicature Act, 1873. LONGMAN *v.* EAST [**C. A. 142**

11. —— *Order of Court for the Sale of Goods—Order LII., Rule 2—Horses.*] An order in an action may be made under Order LII., Rule 2, for the sale of a horse which for a "just and sufficient reason it may be desirable to have sold at once." BARTHOLOMEW *v.* FREEMAN - - **316**

12. —— *Security for Costs in Appeal—Rules of the Supreme Court, Order LVIII., Rule* 15.] An appellant will be ordered to give security for the costs of the appeal who is in insolvent circumstances, and also is vexatiously and unreasonably prosecuting the appeal. *Quære*, whether insolvency in an appellant is a special circumstance within the meaning of Order LVIII., Rule 15, which will entitle the respondent to an order for security for costs. USIL *v.* BREARLEY **C. A. 206**

13. —— *Changing Solicitor—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66) *s.* 25, *sub-s.* 11.] The rule at law as well as in equity, since the passing of the Judicature Acts, 1873 and 1875, is, that an order for changing a solicitor shall be made without any provision as to the payment of the solicitor's costs. GRANT *v.* HOLLAND - **180**

14. —— *Solicitor and Client—Charging Order under* 23 & 24 *Vict. c.* 127, *s.* 28.] The motion for a charging order under 23 & 24 Vict. c. 127, s. 28, must be made before the judge who tried the cause. HIGGS *v.* SCHRADER - - **252**

PRACTICE—*continued.*

15. —— Trial in county court under 19 & 20 Vict. c. 108, s. 26—Right to a jury **21**
See COUNTY COURT.

PRIMAGE—Right to—Bill of lading and charter-party - - - - - **419**
See SHIP AND SHIPPING. 16.

PRINCIPAL AND AGENT—Goods left in possession of vendor - - - **32**
See FACTORS ACT.

PROHIBITION — *Inferior Court — Counter-claim beyond Local Jurisdiction—Judicature Act*, 1873, *ss.* 89, 90.] Under ss. 89 and 90 of the Judicature Act, 1873, an inferior Court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action. DAVIS *v.* FLAGSTAFF MINING COMPANY - - - **C. A. 228**

PROMISE—Of marriage - - - **439**
See INFANT.

PUBLICATION—Of bye-law of local board - **272**
See LOCAL BOARD. 1.

PUBLIC-HOUSE—*Licensing Act*, 1872, 35 & 36 *Vict. c.* 94, *s.* 5—*Sale of Beer by a Person not licensed to sell the same to be drunk on the Premises.*] The defendant, a person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it and carried it across the highway to the cottage of one S., about fourteen yards from the defendant's premises, and handed the jug to S., who was standing in his own garden. S., having drunk some of the beer, returned the jug over the wall to Y. and others, who also drank of it standing on the pathway close to the wall. The jug was re-filled two or three times, and the beer drunk in the same way. The defendant received the money for the beer on each occasion, and saw or might have seen what was going on:—*Held*, that this evidence did not justify a conviction of the defendant under 35 & 36 Vict. c. 94, s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller." BATH *v.* WHITE - - **175**

RAILWAY COMPANY—*Bye-law, Reasonableness of—Passenger travelling without a Ticket—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 103, 109.] A bye-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket" to any duly-authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey:"—*Held*, that, as against a passenger who had, in good faith, travelled a short distance upon the line without having procured a ticket, this bye-law was unreasonable and void,—inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 Vict. c. 20, can be punished only if done fraudulently. LONDON AND BRIGHTON RAILWAY COMPANY *v.* WATSON **429**

RAILWAY COMPANY—*continued.*

2. —— *Common Carriers—Passenger's Luggage placed in Compartment with him—Negligence.*] A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part. Bergheim *v.* Great Eastern Railway Company - **C. A. 221**

3. —— *Fencing Land taken for the Railway from the adjoining Lands not taken—8 & 9 Vict. c.* 20, *s.* 68.] A railway company let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence passed their heads through and over it and did damage to the tenant's crops:—*Held*, that, the duty of fencing being by 8 & 9 Vict. c. 20, s. 68, imposed npon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle. Wiseman *v.* Booker [184

RATIFICATION—Of promise of marriage - 439
See Infant.

REPRESENTATION—As to accuracy of telegraph message - - - - 1
See Telegraph Company.

REFEREE, OFFICIAL—No power to order judgment to be entered - - - 142
See Practice. 10.

RESIDENCE—Within borough or seven miles thereof - - - - 73
See Parliament. 2.

RULES—Order III., r. 6 - - - 280
See Practice. 9.
—— Order XIV. - - - - 67
See Practice. 8.
—— Order XXI., r. 4 - - - 280
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—— Order XXVIII., r. 1 - - - 280
See Practice. 9.
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—— Order LX., r. 4 - - - - 437
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SALE OF GOODS—Order of Court for - 316
See Practice. 11.
—— Induced by fraud - - - 450
See Interpleader.
—— Vendor resuming possession of goods 499
See Conversion.

SCIRE FACIAS—Against director of company in respect of his shares - - 350
See Company. 2.

SHAREHOLDER—Implied acceptance of surrender of shares - - - 350
See Company. 2.

SHERIFF—*Fieri Facias—Poundage—Recovery of Judgment Debt without Sale—*28 *Eliz. c.* 4.] A sheriff, who by compulsion of a writ fi. fa., recovers the amount of a judgment-debt, is entitled to poundage, although after seizure he is paid out by the execution debtor, without a sale of any portion of the goods seized.—*Roe* v. *Hammond* (2 C. P. D. 300) overruled. Mortimore *v.* Cragg [C. A. 216

SHIP AND SHIPPING—*Barges on Thames in Tow of Tug—"Worked or Navigated,"* 22 & 23 *Vict. c. cxxxiii. (Watermen's and Lightermen's Amendment Act,* 1859), *s. lxvi., Bye-law* 60—*Thames Conservancy Bye-law* 16.] 22 & 23 Vict. c. cxxxiii: An Act for the Better Regulation of the Barge Owners and others connected with the Navigation of the River Thames between Teddington Lock and Lower Hope's Point, by s. lxvi. enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the Act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned.—Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the Act. Four men were in charge, but no one was on board either of the two last barges:—*Held*, that the two barges were "worked or navigated" in contravention of the Act, which required a qualified person to be on board each barge to manage it, in case of separation or accident. Elmore *v.* Hunter - - - - 116

2. —— *Charterparty—Foreign Government Refusing to Allow Ship to Load—Vis Major—"Dead Weight."*] By a charterparty it was agreed that the defendants' ship, the *R.*, should, after loading "dead weight" at M., proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the *R.* at M. would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish Government to relax the prohibition, permission to load was refused. The *R.* arrived at V. with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:—*Held*, that the plaintiff could not sue the defendants for not having the *R.* ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo, and the defendants to receive it.—*Ford* v. *Cotesworth* (Law Rep. 4 Q. B. 127; in Ex. Ch. 5 Q. B. 544), followed. Cunningham *v.* Dunn **C. A. 443**

3. —— *Charterparty—Description of Vessel—Warranty.*] A description in a charterparty that a vessel is of a particular class is not a continuing

SHIP AND SHIPPING—*continued.*

warranty, but applies only to the classification at the time the charterparty is made.—*Hurst* v. *Usborne* (18 C. B. 144) approved of. French *v.* Newgass - - - - **C. A. 163**

4. —— *Transfer—Assignment—British Ship built in order to be sold to Foreigner and to be delivered at Foreign Port—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 7—*Merchant Shipping Acts*, 1854, 1862 (17 & 18 *Vict. c.* 104), *ss.* 19, 55, 57; (25 & 26 *Vict. c.* 63), *s.* 3. A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to the plaintiff for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that Act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:—*Held*, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute.—*Held*, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute. Union Bank of London *v.* Lenanton [**C. A. 243**

5. —— *Bill of Lading—Signed by Charterers—Agents for Owner—Expected Perils—Negligent Stowage—Liability of Owners.*] Bags of sugar, shipped by the plaintiffs, were carried in the defendants' steamship from Hamburg to London at an agreed freight. The vessel was chartered for the voyage by P. & K., but the plaintiffs had no knowledge of the charter. The plaintiffs received a bill of lading by the terms of which the sugar was to be delivered in good order, the usual perils and "all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, and it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner be considered the servants of such shipper, owner, or consignee." This bill of lading was signed "P. & K., agents." It is a custom in the case of steamships for the brokers, and not the master, to sign the bills of lading.—Oxide of zinc in casks was negligently stowed above the sugar and consequently damaged it. In an action for the damage, the Court, being empowered to decide questions of fact, and finding that the bill of lading was signed by P. & K., as agents for the defendants and with their authority:—*Held*, that the defendants were bound, and even assuming the absence of such actual authority would have been, under the circumstances, bound by the bill of lading; that the damage from negligent stowage was not within the exceptive clause; and that, therefore, the plaintiffs were entitled to recover. Hayn *v.* Culliford [410

SHIPS AND SHIPPING—*continued.*

6. —— *Charterparty—Primage.*] By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60*s.* per ton *in full;* ship paying all port-charges, pilotages, and towages; the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing.—The master (who was paid a fixed salary, "to include all charges and allowances,") signed a bill of lading for the whole cargo making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, *with 5 per cent. primage in cash on delivery as customary,*"—The cargo was received at the port of discharge by the defendants, the indorsees of the bill of lading, as agents of the charterer, and the freight paid:—*Held*, that the defendants were not liable for primage. Caughey *v.* Gordon [419

—— Liability of managing owner for negligence of master - - - - **121**
See Negligence. 6.

SOLICITOR AND CLIENT—Charging order **252**
See Practice. 14.

—— Costs on changing solicitor - - **180**
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1 & 2 Geo. 4, c. 78, s. 2 - - - **136**
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6 Geo. 4, c. 94, s. 2 - - - **32**
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1 & 2 Wm. 4, c. 37, ss. 3, 9 - - **109**
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1 & 2 Wm. 4, c. 58, s. 1 - - - **450**
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2 Wm. 4, c. 45, s. 33 - - - **73**
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5 & 6 Wm. 4, c. 76, s. 22 - - - **510**
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8 Vict. c. 20, ss. 103, 109 - - - **429**
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8 & 9 Vict. c. 95, s. 129 - - - **389**
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11 & 12 Vict. c. 63, s. 85 - - - **268**
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18 & 19 Vict. c. 120, ss. 6, 16, 17, 18, 54 382
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30 & 31 Vict. c. 142, s. 5 - - - 389
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38 & 39 Vict. c. 92, s. 51 - - - 360
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SURPLUS LAND—Of railway company—Trespass from cattle - - - - 184
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TAXATION — Of costs — Refreshers — Scientific witnesses - - - - 264
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TAXES—Covenant to pay—Construction - 368
See Landlord and Tenant. 5.
TELEGRAPH COMPANY—*Representation of Accuracy of Message—Privity of Contract—Negligence—Liability for Mistake in delivering Message.*] The defendants, a telegraph company, through the negligence of their servants, delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their agents and was intended for them, acted upon it and thereby incurred a loss:—*Held*, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents. Dickson *v.* Reuter's Telegram Company, Limited C. A. 1
THAMES—Barges towed by tug - - 116
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TIME — For appealing against order to sign judgment - - - - 67
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TITLE—Discovery of - - - 196
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TRIAL—In county court—Right to jury - 21
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TRUCK ACT—Payment of wages otherwise than in coin - - - - 109
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USAGE—As to seeds, tillages, &c., between incoming and outgoing tenant - 129
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VENDOR AND PURCHASER—*Conveyance of Fee Simple subject to Void Lease for Years—Right of Purchaser taking with Notice of Void Lease to enter upon Hereditaments held under it—Landlord and Tenant—Evidence of Tenancy from Year to Year—Effect of Acceptance of Nominal Rent for Hereditaments of Substantial Value.*] A tenant for life without leasing power demised a plot of building land for the term of sixty years, from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment.—The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H., who accepted rent at the rate above-mentioned from J., who was a son of the original lessee, and was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the

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grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the anuual value of the house and land was about 6*l.* The plaintiff having sued to recover possession of the house and land:—*Held*, that as the representatives of the original lessee, under the indenture of the 29th of September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the plaintiff claiming under the grant of the fee simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year: and that the plaintiff was entitled to immediate possession of the house and land.—*Prettyman's Case* (2 Vern. 279, cited in *Walton* v. *Stamford*, ibid.) commented upon. Smith *v.* Widlake - - - - - **C. A. 10**

2. —— *Covenant or Stipulation—Public-house Lease.*] By a contract for the sale of a public-house, the vendor agreed to assign and the purchaser agreed to take the lease, "subject to the yearly rent of 90*l.* and the performance of the *covenants* thereby reserved and contained, such covenants being common and usual in leases of public-houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause:—"Provided always and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground-landlord within two months of its date, for the purpose of registration, and a fee of one guinea paid for such registration," and a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to."—The purchaser refused to complete, on the ground that this was not a common and usual covenant; and the jury so found:—*Held*, that whether the proviso in the head lease was a "covenant" in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, and therefore the purchaser was not bound to complete. Brookes *v.* Drysdale **52**

VESTRYMAN—Acting without qualification **382**
See Metropolis Management Act.

WAGES—Payment otherwise than in coin **109**
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WARRANT, DOCK—Left in possession of vendor [**32**
See Factors Act.

WARRANTY—Class of vessel - - **163**
See Ship and Shipping. 3.

WASTE—Of manor—Interest of voter - **97**
See Parliament. 4.

WATER—Flowing from defendant's into adjoining land - - - - **168**
See Nuisance.

WILL—*Bequest of "Personal Estate, Property, Chattels, and Effects"—"Seised"—Construction—Intestacy as to Real Estate.*] A will by which the testator said, "I give and bequeath unto my wife my household goods" (and personalty of various kinds particularly specified), continued, "and all other my personal estate *property* chattels and effects whatsoever and wheresoever to which I am now *seised* possessed or entitled to or may hereafter acquire and can hereby dispose of to hold the same unto my said wife, her executors, administrators and assigns for her and their own use and benefit absolutely." Then followed a formal "devise" of real estate vested in him by way of mortgage in fee, and also of his trust estates to his wife and brother their "heirs and assigns" upon the trusts affecting the same estates respectively:—*Held*, that the word "personal" controlled the subsequent general words of the gift to the wife, and that real estates of which the testator died seized as absolute owner did not pass by the will. Jones *v.* Robinson - **344**

WORDS:—"Carrying on business" - **18**
See Mayor's Court.

—— "Dead Weight" - - - **443**
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—— "Personal estate, property, chattels, and effects" - - - - **344**
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